No. _____

In The

Supreme Court of the United States

October Term, 1992

PACIFIC SOUTHWEST BANK, F.S.B.,

Petitioner,

v.

KELLY P. BRADLEY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the doctrine announced in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) estops a borrower from contradicting her prior sworn written representations contained in a failed federally insured depository institution's records regarding the status of collateral pledged by the borrower, when such collateral is acquired by a successor depository institution from FSLIC as receiver for the failed depository institution.

2. Whether, under the doctrine announced in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), a successor depository institution, which acquired a loan through an assignment and transfer from FSLIC, is charged with the constructive knowledge of its predecessor depository institution regarding the collateral pledged to secure the loan.

3. Whether a borrower may claim a homestead exemption under Texas law for property serving as collateral for a loan made by a federally insured depository institution when the same borrower had previously represented in writing to the same institution, at the time of the loan, that the property was not the borrower's homestead.

LIST OF PARTIES

Petitioner: Pacific Southwest Bank, F.S.B.[1]

Respondent: Kelly P. Bradley

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[1] Pursuant to Supreme Court Rules 14.1(b) and 29.1, Petitioner certifies that the following is a list of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of Petitioner: Pacific USA Holdings Corporation, Pacific American Homes, Inc., and Lifescape Development Corporation.

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FOREWORD

Citations to exhibits introduced at trial will be referred to as "DX" followed by the exhibit number to which reference is made. Citations to the original papers or pleadings filed in the bankruptcy and district courts will be referred to as "R." followed by the page number to which reference is made.

Unless otherwise indicated, all emphases are supplied by counsel.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Pacific Southwest Bank, F.S.B. ("Pacific" or "Petitioner") requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on May 13, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 960 F.2d 502 (5th Cir. 1992) and is reprinted in full in Appendix A, p. 1a, below. The memorandum opinion and order of the United States District

Court for the Northern District of Texas, Fort Worth Division, is reported at 121 B.R. 306 (N.D. Tex. 1990) and is reprinted in full in Appendix B, p. 20a, below. The findings of fact and conclusions of law and the supplemental findings of fact and conclusions of law of the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (Tillman, M.) have not been reported. They are reprinted in full in Appendix C, p. 37a, and Appendix D, p. 55a, respectively, below.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. sections 157 and 1334 (1984), Respondent Kelly P. Bradley ("Bradley" or "Respondent") brought an adversary proceeding in the United States Bankruptcy Court for the Northern District of Texas to determine the validity of a lien originally held by Seguin Savings Association ("Seguin"), the predecessor in interest to Petitioner. By its findings of fact and conclusions of law entered on December 13, 1988, and December 27, 1988, respectively, the bankruptcy court held that Seguin's lien was valid against Bradley. Appendix C, p. 37a, and Appendix D, p. 55a, below. On November 26, 1990, the District Court for the Northern District of Texas entered its memorandum opinion and order in favor of Petitioner affirming the judgment of the bankruptcy court in its entirety. 121 B.R. 306; Appendix B, p. 20a, below.

On Respondent's appeal, the Fifth Circuit Court of Appeals entered its opinion on May 13, 1992, reversing

the bankruptcy and district courts' judgments and remanding the case to the district court for further bankruptcy proceedings consistent with its opinion. *Bradley v. Pacific Southwest Bank, F.S.B. (In re Bradley)*, 960 F.2d 502 (5th Cir. 1992); Appendix A, p. 1a, below. On June 2, 1991, Petitioner timely filed its petition for panel rehearing and its suggestion for rehearing en banc, both of which the Fifth Circuit denied on June 18, 1992. 966 F.2d 1450 (5th Cir. 1992); Appendix E, p. 59a, below. On September 3, 1992, Justice Scalia ordered that the time for filing this Petition for a Writ of Certiorari be extended to and including November 15, 1992.

The jurisdiction of the Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. section 1254(1) (1988).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Statute

12 U.S.C. § 1823(e) (1989).

State Constitution

Tex. Const. art. XVI, § 50 (1845, amended 1973).

Tex. Const. art. XVI, § 51 (1845, amended 1973).

State Statutes

Tex. Prop. Code Ann. § 41.001 (Vernon 1985).

Tex. Prop. Code Ann. § 41.002 (Vernon 1989).

The text of the foregoing constitutional and statutory provisions are reproduced in full in Appendix F, p. 61a, below.

STATEMENT OF THE CASE

A. Introduction

Pacific is the owner of substantially all of the assets of Seguin, a failed Texas savings and loan association. Pacific acquired Seguin's assets on December 29, 1988, through an assignment and transfer from the Federal Savings & Loan Insurance Corporation ("FSLIC"), which had been appointed as receiver for Seguin following its failure. (R. 656-95, 723-24.) The assets Pacific acquired included a $5,350,000 loan made by Seguin to Scott Bradley, a sophisticated Dallas attorney, and his wife, Respondent Kelly P. Bradley (collectively, the "Bradleys"). The collateral for the Bradleys' loan consisted of, among other things, 114.47 acres of a 129.47 acre tract of land located in north Texas and held for development purposes, known as "Paigebrook Farm." Although the Bradleys allegedly used 15 acres of Paigebrook Farm for their home, *it is undisputed that all written records (including the sworn statement that both Scott and Kelly Bradley signed and delivered to Seguin) reflected that the remaining portion of Paigebrook Farm (i.e., the 114.47 acre tract) was not part of the Bradleys' homestead.* (As will be discussed below, a homestead under Texas law is generally not subject to execution by creditors.)

After the Bradleys defaulted on their loan to Sequin and Bradley filed for bankruptcy protection, the bankruptcy court conducted a trial regarding the issue of whether the entire Paigebrook Farm was Bradley's homestead. Consistent with the written documentation, the bankruptcy court found that substantially all of Paigebrook Farm (i.e., the 114.47 acre tract) was not part of the homestead and was therefore subject to the collateral

rights of Seguin. The district court agreed with those findings. 121 B.R. 306; Appendix B, p. 20a, below.

Contrary to the *D'Oench* doctrine, however, the Fifth Circuit concluded that the entire Paigebrook Farm was Bradley's homestead, and thus Pacific as the successor to Seguin could not collect the amounts due and owing on the loan from the sale of Paigebrook Farm. In reaching that result, the Fifth Circuit ignored the Bradleys' prior written statements to the contrary, and relied entirely upon the Bradleys' unwritten conduct related to their use of Paigebrook Farm.

B. Events Leading Up to the Seguin Loan

Beginning in the late 1970s, the Bradleys were involved in the acquisition of several tracts of land in the north Texas area, which they intended to develop and sell to third parties for a profit. In that connection, Scott Bradley, in addition to his law practice at a large Dallas firm, did business under the name of Paigebrook Development Company.

One of the tracts the Bradleys acquired to resell was Paigebrook Farm, which consisted of 129.47 acres of land. (DX 19, 30.) The Bradleys initially bought Paigebrook Farm in 1977 pursuant to a partnership agreement with other parties. Although the Bradleys moved into a home located on approximately 15 acres of the farm, they and their partners intended to develop and sell the remaining 114.47 acres for investment purposes. (DX 19.) In fact, the written partnership agreement regarding Paigebrook Farm expressly provided that the Bradleys' homestead consisted solely of the 15 acres and the remaining portion

was held by all partners for investment purposes. (DX 19.) Consistent with the purposes of the partnership as recited in the partnership agreement, the partnership thereafter marketed the 114.47 acres for sale and development.

In 1982, the local property tax assessor notified Scott Bradley that an agriculture exemption was not available if the partnership continued to own Paigebrook Farm, and that the property taxes would increase dramatically absent a change in ownership of Paigebrook Farm. (DX 31.) Accordingly, Scott Bradley proposed to his partners that he purchase all of their partnership interests so that a single landowner would be eligible for the agriculture exemption, pending commercial/residential development of the property. Accordingly, in early 1982, Scott Bradley purchased all of his partners' interests in the 114.47 acres of Paigebrook Farm. (DX 30, 31.)

After Scott Bradley acquired all outstanding interests in Paigebrook Farm, the Bradleys continued to market the 114.47 acres for residential and/or commercial development up until the time of trial. For example, they requested an engineering firm to develop alternative conceptual studies for development of the property into residential real estate tracts. (DX 32.) A contracting and developing firm, at the Bradleys' request, prepared a site planning report in which the firm estimated the cost to clear and grade roadways, install water wells to provide water to individual lots, and dig electrical trenches. (DX 53-55.)

In addition to the foregoing, the Bradleys also sought financing in connection with their developmental activities. On February 28, 1985, a few months before they obtained the Seguin loan, the Bradleys also applied for a loan from Allied Bank of Texas ("Allied"). In connection with that loan, the Bradleys executed *under oath* and delivered to Allied a homestead disclaimer and designation in which they represented that the 114.47 acres of Paigebrook Farm was not their homestead. (DX 11.) With this background in mind, it is now appropriate to consider the loan transaction that is the subject of this dispute.

C. The Seguin Loan

In August 1985, the Bradleys applied for and obtained a $5,350,000 loan from Seguin. As security for this loan, the Bradleys executed a deed of trust in favor of Seguin, which covered 114.47 acres of Paigebrook Farm. (DX 3.) Only the Bradleys' fifteen (15) acre homestead was excluded from the deed of trust.

Given that Texas law potentially allows up to 200 acres of land as a rural homestead, and to ensure that it had a valid right to the 114.47 acre tract of Paigebrook Farm, Seguin obtained a Homestead Disclaimer and Affidavit (the "Homestead Disclaimer") from the Bradleys. (DX 10; reproduced in pertinent part in Appendix G, p. 65a, below.) In that written document, the Bradleys represented, *under oath*, to Seguin:

> As an inducement to make said [$5,350,000] loan, we represent that the property described in said Deed of Trust [the 114.47 acres] and

> hereinabove described is *not* part of our homestead; that we do *not* now use or occupy same, or any part thereof, and have *no* intention of ever using or occupying same, or any part thereof, as our homestead.

(DX 10; Appendix G, p. 65a, below.) In the same document, the Bradleys designated only the 15 acre tract as their homestead. (DX 10.)

In addition, the Bradleys' attorney, who was also one of Scott Bradley's law partners, submitted an opinion letter (the "Opinion Letter") to Seguin. (DX 13; reproduced in full in Appendix G, p. 66a, below.) In the Opinion Letter, the Bradleys' counsel stated that he and his firm "are of the opinion that *no* part of the 114.47 acre tract constitutes any part of the homestead of the Borrower or his wife." (DX 13; Appendix G, p. 66a, below.) In reliance upon this written Opinion Letter and the written Homestead Disclaimer, Seguin loaned $5,350,000 to the Bradleys.

Importantly, all of Seguin's written documents and records reflected that the 114.47 acre tract was not part of the Bradleys' homestead. There is not a single paper either in Seguin's records or anywhere else stating to the contrary. Indeed, subsequent to the loan, Scott Bradley wrote letters to prospective buyers of the property, attempting to sell the 114.47 acre tract as "an office park site" and as a "major corporate headquarters." (DX 40, 41.) After the Seguin loan transaction, he also wrote letters to the local school district and tax appraiser in which he specifically disclaimed any homestead interest in the 114.47 acre tract. (DX 36, 61.) Thus, at the time FSLIC took over Seguin and at the time Pacific acquired

Seguin's assets from FSLIC, all of the written records expressly reflected that the 114.47 acre tract was not part of the Bradleys' homestead. Accordingly, when Pacific acquired this loan and lien from FSLIC, the only information contained in Seguin's records indicated that Seguin had a valid security interest in 114.47 acres of Paigebrook Farm.

D. Proceedings in the Courts Below

In October 1987, Bradley filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code. In her schedules and statement of affairs, Bradley claimed the entire Paigebrook Farm as her homestead for the first time, and then instituted an adversary proceeding to determine the validity of Seguin's lien against the 114.47 acre tract.

After a trial, the bankruptcy court concluded that Bradley was entitled to claim a homestead exemption for the 15 acre tract only. In this regard, the bankruptcy court found that the Bradleys' household and household effects were situated only on the 15 acre tract, and that the remaining 114.47 acres were vacant development property. Further, and consistent with the Bradleys' written statements to Seguin, the bankruptcy court concluded that the Bradleys had utilized only 15 acres as their homestead and never intended to use the remaining acreage as their homestead. On appeal, and after careful consideration of the entire record, the district court agreed with the bankruptcy court's findings and conclusions.

The Fifth Circuit, however, disagreed with both the bankruptcy and district courts. According to that court, the Bradleys' written Homestead Disclaimer and their intention, as reflected in numerous writings to develop the 114.47 acre tract were "irrelevant." 960 F.2d at 508; Appendix A, p. 10a, below. Instead, the court pointed to the Bradleys' unwritten conduct of mowing hay and raising cattle as conclusive evidence of actual use of the 114.47 acre tract as part of their homestead. Further, the court held that the Homestead Disclaimer did not estop the Bradleys because "Pacific Southwest's predecessor, Seguin Savings, should have known or suspected that Bradley's homestead disclaimer was false." 960 F.2d at 511; Appendix A, p. 16a, below. Incredibly, the Fifth Circuit held for Bradley even while acknowledging that its enforcement of Texas homestead laws in this manner "*might unwittingly 'assist a dishonest debtor in wrongfully defeating his creditor.'* " 960 F.2d at 507 (quoting *Cocke v. Conquest*, 120 Tex. 43, 35 S.W.2d 673, 678 (1931)); Appendix A, p. 7a, below (citations omitted).

Pacific filed a petition for rehearing and rehearing en banc in which it expressly argued to the Fifth Circuit, as it had previously advocated in the district court, that the doctrine announced in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (hereinafter, "*D'Oench*") barred Bradley's claims regarding the validity of Pacific's lien on Paigebrook Farm. (R. at 868-71; Appellee's Petition for Panel Rehearing at 12-14; Appellee's Suggestion for Rehearing En Banc at 13-15.) The Fifth Circuit declined, however, to rehear the matter.

REASONS FOR GRANTING THE WRIT

A. This Petition Raises Issues of Exceptional Federal Importance

This is a case of national importance affecting the integrity and stability of the national banking system. In *D'Oench*, this Court held, as a matter of federal public policy, that any person who lent him or herself to a scheme or arrangement that was *likely to mislead* the banking authorities was estopped to assert such a scheme or arrangement as a defense to the collection efforts of FDIC.[2] 315 U.S. at 460. More specifically, a borrower cannot make a written statement in regard to a loan transaction and later attempt to avoid his or her obligations by contradicting that written statement with matters not appearing in the depository institution's records. *Id.*; *see First State Bank v. City & County Bank*, 872 F.2d 707, 717 (6th Cir. 1989) ("the *D'Oench* estoppel doctrine precludes the enforcement of any oral agreement that is in contradiction with representations made to the FDIC.").

The doctrine in *D'Oench*, as now codified in part in 12 U.S.C. section 1823(e), allows federal and state bank examiners to rely upon a depository institution's records

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[2] FSLIC, like FDIC, is entitled to assert federal common law defenses emanating from *D'Oench* and its progeny. *Twin Constr., Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 382 (11th Cir. 1991); *FSLIC v. Two Rivers Assoc., Inc.*, 880 F.2d 1267, 1277 (11th Cir. 1989). Further, the protection afforded by the *D'Oench* doctrine also transfers to subsequent holders or purchasers of the asset from FDIC and FSLIC. *Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 954 (1991); *FDIC v. Newhart*, 892 F.2d 47, 50 (8th Cir. 1989).

in evaluating its worth.[3] This doctrine also permits banking examiners to rely solely upon the depository institution's records to determine whether to liquidate or to provide financing for the depository institution's acquisition and purchase. In the later situation, this Court has recognized that banking authorities must evaluate their options "with great speed, usually overnight" to preserve the going-concern value of the failed depository institution and to avoid an interruption in banking services. *Langley v. FDIC*, 484 U.S. 86, 91 (1987).

For over 50 years, this Court and the various circuit courts have diligently protected this important federal policy without exception. *See* authorities cited in sections B and C, below. In the present case, however, the Fifth Circuit abrogated well-settled federal law by subordinating the federal policy of protecting Federal Deposit Insurance Corporation ("FDIC") and FSLIC and the public funds they administer in favor of a state policy protecting ill-motivated borrowers, such as Bradley. This holding is contrary to the federal policy enunciated in *D'Oench*. 315 U.S. at 474-75 (Jackson, J. concurring) ("The policy of the federal Act does not seem to me to leave dependent on

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[3] While section 1823(e) on its face only applies to FDIC, it is clear that the policy announced in that statute and in *D'Oench* of protecting the federal regulatory authorities from undocumented agreements, arrangements, and schemes that tend to mislead them and impede their ability to perform is fully applicable to FSLIC. Consequently, section 1823(e) and *D'Oench* are typically construed in tandem making prior decisions interpreting section 1823(e) fully applicable to this case. *Twin Constr., Inc.*, 925 F.2d at 382; *FDIC v. McCullough*, 911 F.2d 593, 598 & n. 4 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991).

local law the question whether one may plead his own scheme to deceive a bank's creditors and supervising authorities as against the Corporation."). Federal policy provides that the borrowers—not the banking authorities or the innocent depositors or creditors of the failed depository institution—must bear the consequences of their involvement with the failed depository institution. *FSLIC v. Gordy*, 928 F.2d 1558, 1568 (11th Cir. 1991).

However, the Fifth Circuit strays from this well-worn precedent by expressly declaring that an affirmative, sworn representation by a borrower, which is contained in the records of a failed depository institution, will *not* estop the borrower from later claiming her defense under state law based solely upon unwritten conduct. 960 F.2d at 510-11; Appendix A, p. 16a, below. The alleged rationale for this ruling appears to be that the *constructive knowledge* of the failed depository institution (Seguin) is charged to the successor depository institution (Pacific), which acquired its interest through an assignment and transfer from FSLIC as receiver. *Id.*

The Fifth Circuit's ruling shakes the very foundation of the federal public policy of protecting FDIC, FSLIC, and the public funds they administer—with potentially devastating effects. For example, in Texas alone, an estimated 468 federally insured depository institutions failed between 1985 and 1991. FDIC, 1991 Annual Report at 21; FDIC, 1989 Annual Report at 11; FDIC, 1987 Annual Report at 6. In 1985, the Texas savings and loan industry made over 53 billion dollars in mortgage loans. Office of Thrift Supervision, *Savings & Home Financing Source Book* B-58 (1988). Therefore, based on relevant banking statistics, it is safe to conclude that these failed Texas

depository institutions were involved in real estate loan transactions in the tens of billions of dollars. Further, in virtually all lending transactions involving individuals, a homestead designation (such as the one signed by the Bradleys here) was customarily required prior to approval of the loans. 7A H. Kendrick & J. Kendrick, Jr., *Texas Transaction Guide*, § 80.200, 80-33 (1992).

Consequently, over the past seven years alone, bank examiners and regulators, as well as successor depository institutions that have purchased the assets of failed depository institutions, have relied upon these records in determining their worth and in selecting a course of action. Therefore, unless this Court overturns the Fifth Circuit's ruling, it necessarily follows that all of these evaluations over the past seven years will be fatally flawed, potentially causing huge losses for federal authorities, successor depository institutions, and the banking system as a whole. *FDIC v. Wood*, 758 F.2d 156, 161 (6th Cir.), *cert. denied*, 474 U.S. 944 (1985). Finally, and most importantly, *the taxpayers will ultimately bear the burden of non-payment of millions of dollars in loans that could otherwise be paid from the sale of real estate collateral.*

Indeed, the impact of the Fifth Circuit's decision below is not limited to Texas. Borrowers such as Bradley will use the Fifth Circuit's decision to assert that their written representations to a failed depository institution should not estop them from later asserting different facts in their defense. Moreover, the Fifth Circuit's decision has potentially disastrous effects because it allows borrowers to use the alleged constructive knowledge of the prior failed depository institution as a defense, despite the fact that such information is *not* contained in that institution's

records. As a result, and in reliance upon the Fifth Circuit's decision below, devious borrowers may succeed in their efforts to mislead the banking authorities and successor institutions in almost every case involving collection efforts.

By allowing the Fifth Circuit's opinion to stand, this Court would severely injure, if not cripple, the banking authorities' ability to rely upon a depository institution's records in evaluating its worth, determining the need for liquidation, or finding potential buyers of the depository institution or its assets. Consequently, the issues presented by this Petition are of exceptional national importance and extend well beyond the rights of the parties in this case—they affect the fundamental ability of banking authorities to regulate and protect the banking industry.

B. The Fifth Circuit's Decision Allowing a Borrower to Assert Unwritten Facts Contrary to Her Written Statement Contained in the Failed Depository Institution's Records Creates a Direct and Apparent Conflict With the Decisions of the Supreme Court, Other Circuit Courts, and Within the Fifth Circuit Itself

In *D'Oench*, this Court held that a borrower who lent himself to a scheme or arrangement that was likely to mislead the banking authorities was estopped to assert the scheme or arrangement as a defense to FDIC's claims. *D'Oench*, 315 U.S. at 461. In *Langley*, this Court further stated that:

> [O]ne who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme

> or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) *or of the truthfulness of a warranted fact.*

Langley, 484 U.S. at 93.[4] Following this Court's opinions in *D'Oench* and *Langley*, various circuit courts, including the Fifth Circuit, consistently cited the language and policy in *D'Oench* and *Langley* for the proposition that a borrower who signs an unqualified obligation may not defeat FDIC's or FSLIC's claim in any situation where the borrower relies on verbal statements or unwritten conduct not appearing in the depository institution's records. *Abrams v. FDIC*, 944 F.2d 307, 310 (6th Cir. 1991); *Buchanan v. FSLIC*, 935 F.2d 83, 86 (5th Cir.), *cert. denied*, 112 S. Ct. 639 (1991); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 380-81 (5th Cir. 1990); *Templin v. Weisgram*, 867 F.2d 240, 241 & n.2 (5th Cir.), *cert. denied*, 493 U.S. 814 (1989); *FDIC v. Galloway*, 856 F.2d 112, 114-15 (10th Cir. 1988); *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1372 (5th Cir. 1988); *FDIC v. Investors Assoc. X., Ltd.*, 775 F.2d 152, 156 (6th Cir. 1985).

In this case, the Bradleys executed an unqualified Homestead Disclaimer, which they are now attempting to disavow. If the Homestead Disclaimer is false--as the Bradleys now claim—then it is an inescapable conclusion that the Bradleys lent themselves to a scheme that was likely to mislead the banking authorities. Accordingly,

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[4] This Court's statement in *Langley* regarding unqualified obligations applies not only to notes, but also to all other types of assets. *D'Oench*, 315 U.S. at 457; *Twin Constr., Inc.*, 925 F.2d at 382.

under *D'Oench* and its progeny, the Bradleys should be estopped from now claiming a homestead exemption over the 114.47 acres of Paigebrook Farm.

Notwithstanding uniform case law holding to the contrary, however, the Fifth Circuit expressly stated that the Bradleys' Homestead Disclaimer, which was contained in the failed depository institution's records, "does *not* estop [Bradley] from claiming the homestead exemption." 960 F. 2d at 511; Appendix A, p. 17a, below. Consequently, there is a direct conflict between the Fifth Circuit's holding in this case and (a) the decisions of this Court in *D'Oench* and *Langley*; (b) the decisions of other circuit courts in *Abrams, Galloway, Cardinal Oil Well Servicing Co.*, and *Investors Assoc. X., Ltd.*; and (c) the prior decisions of the Fifth Circuit itself in *Porras, Buchanan*, and *Templin*.

C. The Fifth Circuit's Decision Charging a Successor Depository Institution With the Constructive Knowledge of the Failed Depository Institution Creates a Direct and Apparent Conflict With the Decisions of the Supreme Court, Other Circuit Courts, and Within the Fifth Circuit Itself

1. The Conflict Between the Supreme Court and the Fifth Circuit. As stated in detail above, this Court has held that federal public policy prohibits borrowers from asserting secret and undisclosed agreements, schemes, or arrangements as a defense to claims of FDIC because such agreements, schemes, or arrangements would tend to mislead regulators. *D'Oench*, 315 U.S. at 460. The holding in *D'Oench* rests upon the assumption that even if a

failed depository institution actually knew of or participated in an undisclosed or side agreement, such knowledge could *not* be imputed to FDIC to defeat its claims against the borrower. In *Langley*, this Court further extended the scope of *D'Oench* by holding that FDIC's own knowledge of the facts underlying the borrowers' defense at the time FDIC acquired the asset could not be used to defeat FDIC's claims. *Langley*, 484 U.S. at 94-95.

In this case, however, the Fifth Circuit ignored this legal precedent and held that (1) the failed insured depository institution (Seguin) had constructive (but not actual) knowledge of the Bradleys' alleged use of the 114.47 acre tract of Paigebrook Farm as their homestead, and (2) such constructive knowledge should be imputed to the successor depository institution (Pacific) as grounds for sustaining Bradley's defense. As a result, the Fifth Circuit's holding now permits debtors to succeed on a defense that is even more attenuated than the defense advanced by the debtor in *Langley* and rejected by this Court. If a borrower is estopped under *D'Oench* and *Langley* from asserting as an affirmative defense the actual, undocumented knowledge of the failed depository institution and the actual knowledge of FSLIC or FDIC, it is inconceivable how the constructive knowledge of the prior failed depository institution (Seguin), completely unknown to FSLIC or its successor, could be imputed to Pacific and still be consistent with this Court's precedent. Obviously, these two positions are hopelessly irreconcilable, and the Fifth Circuit's position must therefore be overturned.

2. The Conflict Between Other Circuit Courts and the Fifth Circuit. Similarly, other circuit courts have unanimously held that facts allegedly known by a failed depository institution but not contained within its written records, even if actually known by FSLIC or FDIC at the time they acquired the asset, would not satisfy the requirements of *D'Oench*, and therefore could not be used to defeat the claims of FSLIC, FDIC, or a sucessor depository institution. *Capital Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (In re 604 Columbus Ave. Realty Trust)*, 968 F.2d 1332, 1344-45 (1st Cir. 1992); *Adams v. Madison Realty & Dev., Inc.*, 937 F.2d 845, 858 (3d Cir. 1991); *Twin Constr., Inc.*, 925 F.2d at 383; *FDIC v. de Jesus Velez*, 678 F.2d 371, 375 (1st Cir. 1982).

For example, in *FDIC v. de Jesus Velez*, the borrower alleged that knowledge of FDIC and constructive knowledge of the bank's board of directors met the requirements of section 1823(e), thereby defeating FDIC's claims. 678 F.2d at 375. However, the First Circuit rejected that argument and held that FDIC's knowledge and the constructive knowledge of the bank's directors were irrelevant. *Id.* Stated succinctly, a claim of actual or constructive knowledge is exactly the type of defense from which FDIC, FSLIC, and a successor depository institution are protected by virtue of *D'Oench* and section 1823(e). *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1107 (1st Cir. 1986).

Since the Fifth Circuit has chosen to charge Pacific with Seguin's constructive knowledge, even though it is undisputed that Pacific acquired its interests through FSLIC, a conflict exists between at least two circuit courts,

which this Court must address and resolve by overruling the Fifth Circuit's decision below.

3. The Conflict Within the Fifth Circuit. Finally, the Fifth Circuit's decision in this case is also inconsistent and conflicts with its prior decisions on the same issue of whether the knowledge of the failed depository institution can be imputed to FDIC, FSLIC, or its successors. *Compare FDIC v. Langley*, 792 F.2d 541, 545 (5th Cir. 1986), *aff'd*, 484 U.S. 86 (1987) and *Kilpatrick*, 907 F.2d at 1528 *with Bradley v. Pacific Southwest Bank, F.S.B. (In re Bradley)*, 960 F.2d at 510-11; Appendix A, p. 15a, below.

In both *Langley* and *Kilpatrick*, the Fifth Circuit held that the knowledge of FDIC prior to its acquisition of the asset from the failed depository institution is irrelevant under section 1823(e). *Langley*, 792 F.2d at 545; *Kilpatrick*, 907 F.2d at 1528. Therefore, if FDIC's or FSLIC's knowledge prior to acquisition is irrelevant and if the borrower has failed to comply with the recordkeeping requirements of *D'Oench* or section 1823(e), the Fifth Circuit's opinion in this case cannot be reconciled with its prior holdings. Consequently, this Court should grant the Petition to resolve this conflict.

Not only does the Fifth Circuit's decision in this case conflict with its prior decisions addressing the imputation of knowledge of a failed depository institution to its successors, its decision also overlooks and ignores without comment two recent Fifth Circuit decisions holding that the federal policy enabling regulatory authorities to rely upon a failed depository institution's records, as announced in *D'Oench*, precludes a borrower's assertion of state homestead laws as a defense to FDIC's or FSLIC's

claims. *Buchanan*, 935 F.2d at 85-86; *Templin*, 867 F.2d at 242; *but see Patterson v. FDIC*, 918 F.2d 540 (5th Cir. 1990).

In *Buchanan*, the debtor challenged the creditor's foreclosure of the lien on her homestead arguing, as Bradley does here, that the lien was void under Texas homestead law. The Fifth Circuit held in favor of First Gibraltar, the successor-in-interest to the original lender, because the debtor " 'lent herself to a scheme or arrangement' that was likely to mislead the FSLIC. She signed a contract containing a recital she knew was wrong. It is inequitable for her now to reverse course and use the inaccuracy of that recital to gain relief from foreclosure." *Buchanan*, 935 F.2d at 86.[5] Therefore, the Fifth Circuit in *Buchanan* held that the borrower was estopped from asserting Texas homestead law as a ground for challenging the foreclosure of the lien on her property. *Id.*

Similarly, in *Templin*, the debtor challenged FDIC's foreclosure of a lien on her homestead arguing that the lien was void under Texas homestead law. Once again, the Fifth Circuit held in favor of FDIC because evidence that the property was the debtor's homestead was not contained in the failed depository institution's records. Therefore, the borrower was estopped from challenging the foreclosure of the lein on her property. *Templin*, 867 F.2d at 242. Fully applicable here is the Fifth Circuit holding in *Templin* that "[w]e cannot ignore the fact that

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[5] In *Buchanan*, the original lender's records indicated that the debtor had signed a contract for improvements stating that no labor had been performed; however, the debtor later claimed that she signed the agreement after the work had started. 935 F.2d at 86.

[the debtor's] conduct is quintessentially the type of conduct against which § 1823(e) was designed to protect the FDIC." *Id.* at 241 n.2.

In reliance upon the holding in *Templin*, the court in *Aero Support Sys., Inc. v. FDIC*, 726 F. Supp. 651 (N.D. Tex. 1989) similarly held that "[t]he Fifth Circuit has recently emphasized that [the policy announced in *D'Oench*] . . . requiring that all agreements be properly recorded in the bank's records as a prerequisite to their enforcement against FDIC overrides even such protections as the homestead exemption protection . . . under the Texas Constitution." 726 F. Supp. at 653.

The Fifth Circuit's decisions in *Buchanan* and *Templin* and the policy announced therein are in direct conflict with the Fifth Circuit's decision in this case. Accordingly, this Court should address and correct this conflict.

CONCLUSION

For any of the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

In the Matter of Kelly P. BRADLEY, Debtor.

Kelly P. BRADLEY, Appellant,

v.

PACIFIC SOUTHWEST BANK, FSB, Appellee.

No. 91-1031.

United States Court of Appeals, Fifth Circuit.

May 13, 1992.

Rehearing and Rehearing En Banc Denied June 18, 1992.

Roger L. Mandel, H. DeWayne Hale, Marc W. Taubenfeld, Hale, Spencer, Stanley, Pronske & Trust, P.C., Dallas, Tex., for appellant.

Susan Foster, Larry F. Amerine, Biggers, Beasley, Amerine & Earle, Dallas, Tex., for appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, JOHNSON and EMILIO M. GARZA, Circuit Judges.

JOHNSON, Circuit Judge:

Even before the ink had dried on the joint resolution of Congress that admitted Texas as the twenty-eighth state in the Union, Texas citizens enjoyed broad homestead rights. *See* Tex. Const. art. VII, § 22 (1845). Not much has changed in the last 145 or so years. As it did in the dawning days of the state, the homestead exemption in Texas continues to "protect citizens and their families

from the miseries and dangers of destitution." *Franklin v. Coffee*, 18 Tex. 413, 415-16 (1857). Kelly P. Bradley, the debtor in this bankruptcy proceeding, appeals the determination of both the bankruptcy court and the district court that she is not entitled to homestead rights in all 129.47 acres of her family farm. Concluding that this determination is based upon an incorrect understanding of Texas homestead law, this Court reverses the judgment of the courts below and remands to the district court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Debtor Kelly P. Bradley and her husband, Scott Bradley, own 129.47 acres of rural property located within the city limits of Westlake, Texas. The Bradleys acquired this property, known as "Paigebrooke Farm," through a partnership agreement they executed with several other investors in 1977. The partnership agreement specified that the Bradleys could occupy fifteen acres of Paigebrooke Farm as their homestead, but the partnership would seek to develop the remaining 114.47 acres of the property for commercial or residential use. The Bradleys moved into a house located in the approximate center of the farm and, in accordance with the partnership agreement, constructed several ranch buildings within an unfenced fifteen acre section surrounding the family house.[1] Since 1978 they have used the remaining acreage to grow hay and raise cattle.

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[1] According to the bankruptcy court's findings of fact and conclusions of law, the buildings that the Bradleys added to the Paigebrooke Farm property included "a small foreman's house,

In 1982, after repeated unsuccessful attempts to develop the remaining 114.47 acres of Paigebrooke Farm, the Bradleys terminated the partnership and purchased the interests of the other investors. Subsequently, the Bradleys have used all 129.47 acres of Paigebrooke Farm as their home and ranch. Besides growing hay and raising cattle on the remaining 114.47 acre section of the property, since at least 1985 they have also bred and sold horses on the property. The Bradleys have registered the entire farm with the USDA Soil Conservation Service and have filed Schedule F farm income forms with their annual tax returns.

In August 1985 Kelly Bradley and her husband entered into a loan transaction with Seguin Savings Association, the predecessor of current creditor Pacific Southwest Bank, FSB. Seguin Savings agreed to loan the Bradleys a sum in excess of five million dollars. As part of the collateral to secure payment of the note, the Bradleys granted Seguin Savings a third lien deed of trust covering all of Paigebrooke Farm except the fifteen acres on which their home and ranch buildings stood. In addition, the Bradleys executed a "homestead disclaimer" that purported to release all of their homestead claims to the 114.47 acres.

Two years later, Kelly Bradley filed a voluntary petition for Chapter 11 bankruptcy relief. Electing the state

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an eight-stall horse stable with a tack and feed room, two storage sheds, another storage shed for hay, a chicken coop, two corrals and a chute for working cattle." Findings of Fact at 3.

exemption scheme authorized in the Bankruptcy Code,[2] Bradley claimed a rural homestead in all 129.27 acres of Paigebrooke Farm. Because Texas law does not permit creditors to satisfy their claims through forced sale of a homestead, Bradley requested that the bankruptcy court disallow Seguin Savings' secured claim against Paigebrooke Farm. On December 12, 1988, the bankruptcy court entered findings of fact and conclusions of law. The court concluded that Paigebrooke Farm indeed was rural in character and that Bradley had neither alienated nor abandoned her homestead rights to the property. The court further concluded, however, that the debtor could claim only fifteen acres of the farm as her rural homestead.[3] On November 26, 1990, the district court affirmed these conclusions. 121 B.R. 306.

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[2] A Texas debtor in bankruptcy proceedings must elect between the "federal" and the "state" exemption scheme. *In re Dyke*, 943 F.2d 1435, 1438 (5th Cir.1991). As a general rule, election of the state exemption scheme permits the debtor to claim the general exemptions contained in the Texas Property Code, while election of the federal scheme relegates the debtor to the exemptions specified in section 522(d) of the Bankruptcy Code. *In re Goff*, 706 F.2d 574, 579 (5th Cir.1983). "The debtor cannot elect the most favorable exemptions in each scheme: he must weigh the advantages of each scheme and then choose one or the other." *Dyke*, 943 F.2d at 1438.

[3] The bankruptcy court attempted to buttress this conclusion with supplemental findings of fact and conclusions of law entered on December 27, 1988, in which it found that (1) a 114.47 acre portion of Paigebrooke Farm was vacant development property and (2) the Bradleys had expressed their intent to use only fifteen acres of the farm as their homestead.

II. DISCUSSION

Texas law recognizes both urban and rural homesteads. If a debtor uses land as "an urban home or as a place to exercise a calling or business in the same urban area," then the debtor is entitled to claim up to an acre of the land, in one or more tracts, as an urban homestead.[4] Tex.Prop.Code Ann § 41.002(a) (Vernon Supp.1991). *See also* Tex. Const. art. XVI, § 51.[5] If a debtor uses land "for the purposes of a rural home," then the debtor is entitled to claim up to two hundred acres of the land, in one or more tracts, as a rural family homestead.[6] Tex.Prop.Code

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[4] To the extent that the urban homestead does not exceed one acre, the urban homestead encompasses the land on which the economic head of the family exercises her business or calling. *See* McSwain, *The Texas Business Homestead in 1990*, 42 Baylor L.Rev. 657, 659 (1990).

[5] Prior to 1983 amendments to the Texas Property Code, debtors could only exempt a maximum of $10,000 of the value of their urban homestead. This monetary exemption is no longer available – even to urban homesteads created before 1983. The 1983 amendments, which permit Texas debtors with urban homesteads to exempt up to an acre of land, apply retroactively. Tex.Prop.Code Ann. § 41.002(d) (Vernon Supp.1991) ("The definition of a homestead as provided in this section applies to all homesteads in this state whenever created."). *See also In re Webb*, 954 F.2d 1102, 1107 (5th Cir.1992).

[6] A debtor with a family is entitled to claim a rural homestead consisting of no more than two hundred acres. Tex.Prop.Code Ann. § 41.002(b)(1). A single adult debtor, on the other hand, is entitled to claim a rural homestead consisting of no more than one hundred acres. *Id.* § 41.002(b)(2).

Unlike the urban homestead, *see supra* note 4, the rural homestead does not encompass a "business homestead," and indeed, the operation of a business on part of a rural homestead forfeits the homestead protection on that part of the property.

Ann. § 41.002(b) (Vernon Supp.1991). *See also* Tex. Const. art XVI, § 51. In either instance, the Texas homestead is exempt from forced sale "except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon." Tex. Const. art. XVI, § 50.

Bradley contends that the bankruptcy court, as well as the district court, erred in limiting her to a fifteen acre homestead. She argues that, under Texas law, she is entitled to claim all 129.47 acres of Paigebrooke Farm as her rural homestead. On appeal of a bankruptcy proceeding, this Court applies a two level standard of review. We review the factual findings of the bankruptcy court under the "clearly erroneous" standard. *In re Niland*, 825 F.2d 801, 806 (5th Cir.1987). According to this deferential standard, we should overturn the factual findings of the bankruptcy court only when, after review of all the evidence, we are left with a "firm and definite conviction" that the bankruptcy court committed a mistake. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Unlike factual findings, however, we review the legal conclusions of the bankruptcy court under the less deferential de novo standard. *In re Missionary Baptist Foundation*, 712 F.2d 206, 209 (5th Cir.1983). Thus, if a bankruptcy court premises a finding

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O'Brien v. Woeltz, 94 Tex. 148, 58 S.W. 943, 945 (1900). Aside from business operations, however, the rural homestead does include all land – up to the limit of two hundred acres – that is used for the support of the debtor and her family. *See Clark v. Salinas*, 626 S.W.2d 118, 120 (Tex.App. – Corpus Christi 1981, writ ref'd n.r.e.); *Sims v. Beeson*, 545 S.W.2d 262, 263 (Tex.Civ.App. – Tyler 1977, writ ref'd n.r.e.).

of fact upon an improper legal standard, the finding of fact "loses the insulation of the clearly erroneous rule." *Id.*

The de novo standard requires that this Court conduct an independent analysis of Texas homestead law. *See Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991).[7] Because homesteads are favorites of the law, we must give a liberal construction to the constitutional and statutory provisions that protect homestead exemptions. *See Tolman v. Overstreet*, 590 S.W.2d 635, 637 (Tex.Civ.App. – Tyler 1979, no writ); *Kunkel v. Kunkel*, 515 S.W.2d 941, 946 (Tex.Civ.App. – Amarillo 1974, writ ref'd n.r.e.); *Garrett v. Katz*, 23 S.W.2d 436, 438 (Tex.Civ.App. – Dallas 1929), *modified on other grounds*, 27 S.W.2d 373 (Tex.Civ.App. – Dallas 1930, no writ). Indeed, we must uphold and enforce the Texas homestead laws even though in so doing we might unwittingly "assist a dishonest debtor in wrongfully defeating his creditor." *Cocke v. Conquest*, 120 Tex. 43, 35 S.W.2d 673, 678 (1931). Mindful of these principles, we turn to the substance of this case.

A. *Initial Burden of Proof*

It is well settled in Texas that an individual who seeks homestead protection has the initial burden to establish the homestead character of her property. *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 314 (Tex.App. –

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[7] To interpret state homestead rights, this Court must, of course, look to state law. *See In re Moody*, 77 B.R. 580, 590 (S.D.Tex.1987), *aff'd* 862 F.2d 1194 (5th Cir.1989).

Houston [14th Dist.] 1983, writ ref'd n.r.e.). To meet this initial burden of proof, the claimant must "show a combination of both overt acts of homestead usage and the intention on the part of the owner to claim the land as a homestead." *Sims v. Beeson*, 545 S.W.2d 262, 263 (Tex.Civ.App. – Tyler 1976, writ ref'd n.r.e.). Once the claimant has established the homestead character of her property, the burden shifts to the creditor to disprove the continued existence of the homestead. *See Sullivan v. Barnett*, 471 S.W.2d 39, 43 (Tex.1971); *Lifemark Corp.*, 655 S.W.2d at 314.[8]

The initial burden to establish the homestead character of property is a short hurdle. In the usual case, mere evidence of "overt acts of homestead usage" is sufficient to meet this burden. As long as the claimant can demonstrate that she has used her property for homestead purposes, then the Texas courts will presume that the homestead claimant possesses the requisite intent. *See Youngblood v. Youngblood*, 124 Tex. 184, 76 S.W.2d 759, 761 (1934). "Possession and use of land by one who owns it and who resides upon it makes it the homestead *in law and in fact*." *First Interstate Bank v. Bland*, 810 S.W.2d 277, 286 (Tex.App. – Fort Worth 1991, no writ) (emphasis added). *See also Lifemark Corp.*, 655 S.W.2d at 315 ("[I]nvestigation of intention need not be made when the land is actually put to homestead use. Such actual use is

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[8] Once gained, homestead rights are not easily lost. "The only way for property to lose its homestead, after it has been dedicated as a homestead, is by death, abandonment or alienation." *Garrard v. Henderson*, 209 S.W.2d 225, 229 (Tex.Civ.App. – Dallas 1949, no writ).

the most satisfactory and convincing evidence of intention.").[9]

In the instant case, Bradley demonstrated that she and her family have used all 129.47 acres of Paigebrooke Farm for homestead purposes. As the bankruptcy court acknowledged in its findings of fact, Bradley and her family live in a house on the property and have used the entire farm to grow hay and raise livestock. Findings of Fact at 3. The Texas courts have routinely held that use of property for farming or ranching purposes, accompanied by occupancy of the property, is sufficient to imbue the property with a homestead character. *See Fajkus v. First National Bank*, 735 S.W.2d 882, 884 (Tex.App. – Austin 1987, writ denied) (grazing of cattle is use of property for homestead purposes); *Clark v. Salinas*, 626 S.W.2d 118, 120 (Tex.App. – Corpus Christi 1981, writ ref'd n.r.e.) (cultivation of crops is use of property for homestead purposes). Accordingly, we conclude that Bradley has satisfied her burden to establish the homestead character of her farm as a matter of law.

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[9] Evidence of objective intent might be material in cases in which specific circumstances raised the issue. *See Braden Steel Corp. v. McClure*, 603 S.W.2d 288, 293 (Tex.Civ.App. – Amarillo 1980, no writ). For example, if a rural family homestead claimant owns several two hundred acre tracts of land, all of which the claimant uses for homestead purposes, then evidence of intent is material to determine which of the tracts is the homestead. Similarly, if a rural family homestead claimant owns a single four hundred acre tract of land, all four hundred acres of which the claimant uses for homestead purposes, then evidence of intent is material to determine which two hundred acres of the tract is the homestead. No such circumstances, however, are evident in the instant case.

Despite the fact that Bradley established her homestead rights in Paigebrooke Farm as a matter of law, the bankruptcy court limited her homestead rights to fifteen acres. According to the bankruptcy court, the evidence indicated that Bradley and her husband *intended to use* only fifteen acres of Paigebrooke Farm as her homestead. To support this conclusion, the bankruptcy court emphasized (1) that the remaining 114.47 acre portion of the farm was "vacant" property with the Bradleys held for investment and development purposes and (2) that the Bradleys executed a disclaimer in which they presented that the remaining 114.47 acres was not part of their homestead. While we do not necessarily dispute the truth of these two findings,[10] we cannot conclude that these findings are relevant. As we have noted, the evidence that Bradley used Paigebrooke Farm for homestead purposes obviates consideration of any evidence that she did not *intend* to claim all of it as her homestead. *See Lifemark Corp.*, 655 S.W.2d at 315.

The finding that Bradley held 114.47 acres of Paigebrooke Farm open for development does not support the severance of this acreage from her homestead. Unless the

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[10] We are somewhat troubled with the bankruptcy court's characterization of the 114.47 acre portion of the farm as "vacant." While there were no improvements on this portion of Paigebrooke Farm, the record clearly indicates that this acreage was occupied and used to support farming and ranching activities. To the extent this finding that the 114.47 acre portion was "vacant" was meant to supplant the bankruptcy court's initial finding that Bradley used the land to grow hay and raise cattle, it is clearly erroneous.

claimant has abandoned part of the homestead,[11] Texas law does not favor the severance of a single contiguous tract of land into homestead and non-homestead sections. *See Youngblood v. Youngblood*, 124 Tex. 184, 76 S.W.2d 759, 760 (1934) (contiguity of parcels presents a situation favorable to the extension of the homestead to the outside boundaries of the land); *Vaughn v. Vaughn*, 279 S.W.2d 427, 435 (Tex.Civ.App.–Texarkana 1955, writ ref'd n.r.e.) (same). Absent abandonment, the severance of a tract of land from the homestead is permissible only if there is ***no*** evidence that the severed tract is used for homestead purposes. *See O'Brien v. Woeltz*, 94 Tex. 148, 58 S.W. 943, 945 (1900); *McDonald v. Clark*, 19 S.W. 1023, 1025 (Tex.1892); *Prince v. North State Bank*, 484 S.W.2d 405, 410 (Tex.Civ.App.–Amarillo 1972, writ ref'd n.r.e.); *Ferguson v. Smith*, 206 S.W. 966, 967 (Tex.Civ.App.–Dallas 1918, writ ref'd). *But see Massillon Engine & Thresher Co. v. Barrow*,

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[11] To abandon a homestead, the owner of the property must evince a "present, definite and permanent intent to cease use of the property for homestead purposes." *West Texas State Bank v. Helms*, 326 S.W.2d 47, 49 (Tex.Civ.App. – Eastland 1959, no writ). If a property owner uses party of his homestead property for purposes inconsistent with the homestead laws, then the owner has effectively abandoned that part of the homestead. *See Uvalde Rock Asphalt Co. v. Warren*, 127 Tex. 137, 91 S.W.2d 321, 323 (1936); *Massillon Engine & Thresher Co. v. Barrow*, 231 S.W. 368, 370 (Tex.Comm'n App.1921, judgm't adopted); *Ray v. Metzger*, 165 S.W.2d 207, 210 (Tex.Civ.App. – Fort Worth 1942), *aff'd*, 141 Tex. 372, 172 S.W.2d 480 (1943); *Scottish American Mortgage Co. v. Milner*, 30 S.W.2d 582, 584 (Tex.Civ.App. – Texarkana 1930, writ ref'd). In this case, the bankruptcy court expressly concluded that Bradley never abandoned her homestead rights in the farm. Findings of Fact at 3. The creditor on appeal does not dispute this finding.

231 S.W. 368, 370 (Tex.Comm'n App. 1921, judgm't adopted) (law implies constructive use of entire tract until there is use inconsistent with the homestead laws). In this case, where the debtor has conclusively demonstrated that she used all 129.47 acres of Paigebrooke Farm for homestead purposes, Texas law does not permit severance.

We might have reached a different conclusion if Bradley had successfully sold or leased part of Paigebrooke Farm for commercial or residential development. In such an event, Bradley would have abandoned that part of the farm.[12] The record here reveals, however, that the Bradleys did not realize their intentions to develop part of Paigebrooke Farm. *Unsuccessful* attempts to sell or develop property do not "deprive it of its homestead character." *West Texas State Bank v. Helms*, 326 S.W.2d 47; 49 (Tex.Civ.App.–Eastland 1959, no writ). *See also Sullivan*, 471 S.W.2d at 43; *West v. Austin Nat'l Bank*, 427 S.W.2d 906, 912 (Tex.Civ.App.–San Antonio 1968, writ ref'd n.r.e.).[13] Because Bradley did not actually sell or lease Paigebrooke Farm for commercial or residential development, her attempt to develop the farm does not defeat her homestead rights in the entire farm. *See Gaar, Scott & Co. v. Burge*, 49 Tex.Civ.App. 599, 110 S.W. 181, 183 (1908) ("an intention to sell the homestead and efforts in that

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[12] *See supra* note 11.

[13] The mere attempt to sell or develop land reflects, at best, the intent to abandon a homestead in the future. An intent to abandon land in the future does not divest the land of its homestead character. *Bass v. Ware*, 203 S.W.2d 1001, 1002 (Tex.Civ.App.–Waco 1947, writ ref'd n.r.e.).

direction, and an intention to remove from it in case a sale is made, may coexist with an intention to remain and continue to occupy the homestead").

Likewise, the fact that Bradley executed a document disclaiming her homestead rights in part of Paigebrooke Farm does not eliminate her homestead rights in the entire farm. Under Texas law, a homestead disclaimer, while effective in circumstances that would *estop* a claimant from asserting the homestead right,[14] is irrelevant in the determination whether the claimant has satisfied her initial burden of proof. *See Bland*, 810 S.W.2d at 283; *Englander Co. v. Kennedy*, 424 S.W.2d 305, 308 (Tex.Civ.App.–Dallas), *writ ref'd per curiam*, 428 S.W.2d 806 (Tex.1968). A homestead disclaimer cannot "change the character of the true homestead." *City Central Bank & Trust Co. v. Byrne*, 47 S.W.2d 432, 434 (Tex.Civ.App.–San Antonio 1932, writ ref'd). As long as the claimant has occupied the property in question and used it for homestead purposes, then an attempted homestead disclaimer will not preclude her from claiming the homestead exemption. *Ray v. Metzger*, 165 S.W.2d 207, 209 (Tex.Civ.App.–Fort Worth 1942), *aff'd*, 141 Tex. 372, 172 S.W.2d 480 (Tex.1943). In this case, as we have noted, it is clear that Bradley has occupied all 129.47 acres of Paigebrooke Farm and used it for homestead purposes.

In sum, then, Bradley has established the homestead character of Paigebrooke Farm as a matter of law. She has demonstrated that she occupies a house on the farm and that she uses the entire farm for homestead purposes.

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[14] *See infra* section II.B.

Neither the fact that Bradley attempted to hold the farm open for development purposes nor the fact that Bradley executed a disclaimer of her homestead rights in part of the property after this showing. Therefore, Bradley cannot be foreclosed from claiming a homestead exemption in all 129.47 acres of Paigebrooke Farm.

B. *Estoppel*

Creditor Pacific Southwest argues that, even if this Court concludes that Bradley satisfied her initial burden to establish her homestead rights in all 129.47 acres of Paigebrooke Farm, Bradley should be estopped from claiming a homestead right in the vacant 114.47 acre section of the farm. Pacific Southwest contends that Bradley's homestead disclaimer, in which the debtor represented that the 114.47 acre section was not part of her homestead, estops her from invoking her state constitutional and statutory homestead rights because Pacific Southwest has relied on her disclaimer to its detriment.

In *In re Niland*, 825 F.2d 801 (5th Cir. 1987), this Court rejected a similar argument. The debtor in *In re Niland*, like Bradley in the instant case, had executed a disclaimer of his homestead rights after he had obtained a loan secured by a deed of trust on his property. The creditor argued that the debtor's misrepresentation of his homestead rights estopped the debtor from claiming the property as his homestead. The court, however, reasoned that "a homestead claimant is not estopped to assert his homestead rights in property on the basis of declarations made to the contrary if, at the time of the declarations, the claimant was in actual use and possession of the

property." *Id.* at 808. Finding that the debtor indeed was in actual use and possession of his property at the time he misrepresented his homestead rights, the Court concluded that the debtor was not estopped from claiming the property as his homestead. *Id.* at 810.

Recently, in *First Interstate Bank v. Bland*, 810 S.W.2d 277 (Tex.App.–Fort Worth 1991, no writ), the Fort Worth Court of Appeals confirmed that a debtor who establishes homestead rights as a matter of law cannot be estopped from claiming her homestead exemption. "When the facts of actual possession and use are coupled with the interest in the property held by the borrower, the premises become a homestead in fact and in law. . . . A lender stands charged with notice of the fact of homestead and it matters not what declarations to the contrary the borrower might make." *Id.* at 283-84.[15]

As recognized in *Niland* and reiterated in *Bland*, lenders are subject to a duty of inquiry. If the circumstances were such that a lender should have known or suspected that a homestead disclaimer was false, then the Texas courts will not enforce the disclaimer against the debtor.[16] This rule would appear to be unfair to lenders

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[15] The *Bland* court observed that this rule of law rests "on the theory that the fact of actual possession and use of the property as a home is of so obvious a nature that the lender cannot close his eyes to the facts." 810 S.W.2d at 283.

[16] The *Bland* court recognized only two situations in which a disclaimer will estop the debtor from claiming homestead rights: (1) at the time of the disclaimer, the debtor owned two or more noncontiguous pieces of property, either of which – but not both – could constitute the homestead; and (2) at the time of the disclaimer, the property described in the disclaimer is not

and creditors – allowing debtors to mislead lenders about the extent of their homestead rights in order to obtain loans. Nonetheless, Texas law places this burden on the lender. "To hold otherwise would practically abrogate the [Texas] Constitution." *Texas Land & Loan Co. v. Blalock*, 76 Tex. 85, 13 S.W. 12, 13 (1890). *See In re Niland*, 825 F.2d at 809 ("This rule is . . . based on a recognition that many in financial difficulties will sign anything to obtain money from lenders, and that if not put to a duty of inquiry, many lenders will simply have the borrower execute a form affidavit stating that the property is not claimed as homestead.").

In the instant case, the circumstances were such that Pacific Southwest's predecessor, Seguin Savings, should have known or suspected that Bradley's homestead disclaimer was false. At the time that Bradley represented to Seguin Savings that she did not have homestead rights in the vacant 114.47 acres of Paigebrooke Farm, Bradley and her family lived in a house on the farm and were using the entire farm – including the 114.47 acre section – for homestead purposes.[17] Since the available facts indicated

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being used for homestead purposes. 810 S.W.2d at 284. Neither of these situations pertains here. Although the Bradleys owned several tracts of land in north Texas, the evidence reveals that none of these tracts could have supported a homestead exemption – that is, the Bradleys did not have a home on any of these tracts.

[17] Bradley and her husband have made other homestead disclaimers besides the one they made to Seguin Savings. For example, in the 1977 partnership agreement, Bradley and her husband stated that they would occupy as their homestead only the fifteen acres on which their home and related ranch buildings were located. This 1977 agreement perhaps was executed before the Bradleys began to use the vacant 114.47 acres of

that Bradley was occupying and using all 129.47 acres of Paigebrooke Farm as her homestead, her contrary declaration does not estop her from claiming the homestead exemption.

C. *Rural Character of the Homestead Property*

Pacific Southwest argues that, even if this Court should conclude that Bradley is not estopped from claiming homestead rights in all 129.47 acres of Paigebrooke Farm, this Court should still affirm the bankruptcy court on the basis that Bradley cannot claim a rural homestead in the property. Pacific Southwest claims that because Paigebrooke Farm is located within the city limits of Westlake, Texas, Bradley can only claim an urban homestead of one acre. *See* Tex.Prop.Code Ann. § 41.002(a) (Vernon Supp.1991). This argument fails. City limit signs do not determine the urban or rural character of a homestead. Instead, according to the Texas Property Code, "[a] homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection." *Id.*

Paigebrooke Farm for homestead purposes. If so, then the agreement might estop the Bradleys from claiming homestead rights against a lender who relied on this particular agreement. *See In re Niland*, 825 F.2d at 808. Seguin Savings, however, did not rely on this 1977 agreement. Rather, the evidence indicates that if Seguin Savings relied on any homestead disclaimer, it relied upon the disclaimer that the Bradleys executed when they obtained their 1985 loan from Seguin Savings.

§ 41.002(c).[18] At the time that Bradley began to use Paigebrooke Farm as her homestead, the farm received no

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[18] Section 41.002(c) of the Texas Property Code is a new addition to the Texas Property Code. The Texas legislature added this definition in 1989 as part of its function to implement the homestead provisions in the Texas Constitution. *See In re Moody*, 862 F.2d 1194, 1201 (5th Cir. 1989) ("The Texas Constitution is logically viewed as an enabling act, with the statute as its implementation . . . "). To the extent that it applies, it governs even those homesteads created before 1989. Tex.Prop.Code Ann. § 41.002(d) (Vernon Supp.1991).

The Texas Constitution states that "the homestead in a *city, town or village* shall consist of lot or lots amounting to not more than one acre of land." Tex. Const. art. XVI, § 51 (emphasis added). One commentator has suggested that, because the constitution *seems* to define the urban homestead with reference to the location of city limits, the legislature might have abused its authority in asserting a different definition of the urban homestead in section 41.002(c). McSwain, *supra* note 4, at 661. The state constitution, though, does not define the term "in a city, town or village." Nor does the constitution attempt to determine when a homestead is urban and when a homestead is rural. When given the power to implement constitutional provisions, as it has with respect to the homestead laws, "the legislature may define terms which are not defined in the constitution itself, provided its definitions constitute reasonable interpretations of the constitutional language and do not do violence to the plain meaning and intent of the constitutional framers." *Swearingen v. City of Texarkana*, 596 S.W.2d 157, 160 n.1 (Tex.Civ.App.–Texarkana 1979, writ ref'd n.r.e.). The definition in section 41.002(c) of the Property Code is a reasonable interpretation of the constitutional language and does not do violence to the intent of the constitutional framers.

It is unclear whether section 41.002(c) applies in all homestead disputes. At the least, the definition of "homestead" in section 41.002(c) applies in cases, like the instant case, involving the threatened foreclosure of homestead property. *See* Debate on Tex.S.B. 642, 71st Leg. (May 1989) (remarks of Sen. Parker) ("A

utility or other municipal services from the City of Westlake. Therefore, Paigebrooke Farm is a rural homestead, and Bradley is entitled to claim up to two hundred acres as her rural family homestead exemption. *See id.* § 41.002(b)(1).

III. CONCLUSION

Under Texas law, debtor Bradley is entitled to rural family homestead protection covering all 129.47 acres of Paigebrooke Farm. The judgment of the courts below is reversed and the case is remanded to the district court for further bankruptcy proceedings consistent with this opinion.

REVERSED AND REMANDED.

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question occurred as to exactly what we meant on homestead on this – in this foreclosure provision and this clarifies the term 'homestead.' "). Some language in the legislative history of this section, however, suggests that section 41.002(c) might not displace the traditional common law definition of "homestead" in all cases. Under the traditional analysis, the Texas courts examine several factors to determine whether a homestead is rural or urban: (1) the location of the land with respect to the limits of the municipality; (2) the situs of the lot in question; (3) the existence of municipal utilities and services; (4) the use of the lot and adjacent property; and (5) the presence of platted streets, blocks, and the like. *See Vistron Corp. v. Winstead*, 521 S.W.2d 754, 755 (Tex.Civ.App.–Eastland 1975, no writ); *Rockett v. Williams*, 78 S.W.2d 1077, 1078 (Tex.Civ.App.–Dallas 1935, writ dism'd); *Purdy v. Grove*, 35 S.W.2d 1078, 1081-82 (Tex.Civ.App.–Eastland 1931, writ ref'd); *see also* 43 Tex.Jur.3d *Homesteads* § 15 (1985) (and cases cited therein). The availability of municipal utilities and services is merely one factor in this traditional analysis.

APPENDIX B

Kelly P. BRADLEY

v.

PACIFIC SOUTHWEST BANK, F.S.B.

Civ. A. No. 4-89-541-E.

United States District Court,
N.D. Texas,
Fort Worth Division.

Nov. 26, 1990.

H. DeWayne Hale, J. Mark Chevallier, Hale Spencer Stanley & Trust, Dallas, Tex., for plaintiff

Larry F. Amerine, Susan Foster, Biggers Beasley Amerine & Earle, Dallas, Tex., for defendant.

MEMORANDUM OPINION AND ORDER

MAHON, District Judge.

This is an appeal from an order in an adversary proceeding in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, the Honorable Massie Tillman, presiding. The adversary proceeding involved a complaint to determine the validity of a lien and for equitable subordination. By order of December 12, 1988, the Bankruptcy Court held that the appellant debtor's property, known as Paigebrooke Farms, was rural homestead property and that the debtor was entitled to claim fifteen acres as her rural homestead under existing Texas law. On December 15, 1988, appellant filed a motion to alter or amend judgment, which was denied on December 27, 1988. On December 22, 1988, appellee

filed a motion to amend findings of fact and conclusions of law. The Bankruptcy Judge thereafter entered supplemental findings of fact and conclusions of law on December 27, 1988. On January 10, 1989, the appellant simultaneously filed a notice of appeal and a motion for a new trial. The order denying motion for new trial was entered June 9, 1989. Subsequently, on June 16, 1989, appellant filed her second notice of appeal. Thereafter, on June 23, 1989, appellant filed her "Amended Notice of Appeal."

On June 22, 1990, this Court ordered further briefing by the parties on the jurisdiction of this Court to hear the appeal. First, the Court requested the parties to brief whether the order of the Bankruptcy Judge was a final order or merely an interlocutory order. Secondly, the Court requested further briefing on whether the motion to alter or amend judgment tolled the time for presenting the motion for new trial. The parties have timely submitted their briefs on these issues. After a thorough review of the briefs, the record, and applicable law, the Court makes the following determination.

A. *Jurisdiction*

On December 12, 1988, the Bankruptcy Court disposed of Count 1 of appellant's complaint in its order directing that appellant's rural homestead was limited to the fifteen-acre tract located in the center of the subject property. The Bankruptcy Court likewise disposed of Count II of appellant's complaint in its December 13, 1988 order of non-suit of Count II. Because appellee prevailed on Count I and retained its deed of trust lien on the

property, the appellee's counterclaim to deny the discharge of appellant's debt was rendered moot. Accordingly, the Bankruptcy Court has disposed of all issues in this suit, and the December 12, 1988 order was a final order and appealable.

Bankruptcy Rule 8002(a) required appellant to file her notice of appeal within ten days after the entry of the December 12, 1988 order of the Bankruptcy Court.[1] From the record, the Court finds that the appellant failed to do so. However, appellee's timely filing of a motion to amend findings of fact and conclusions of law pursuant to Fed.R.Civ.P.Rule 52 on December 22, 1988, effectively tolled the ten-day period for appellant to file her notice of appeal. Bankruptcy Rule 8002(b) provides *inter alia* that "if a timely motion is filed by any party . . . under Rule 7052(b)[2] to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying any . . . such motion." Because the Appellee timely filed a Rule 7052(b) motion to amend findings of fact and conclusions of law, the Court finds that appellee's motion tolled the time for filing the notice of appeal until such time as the Bankruptcy Court entered its supplemental findings of fact and conclusions of law on December 27, 1988.

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[1] Bankruptcy Rule 8002(a) states *inter alia* that "the notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from."

[2] Bankruptcy Rule 7052 incorporates by reference Fed.R.Civ.P. Rule 52.

Thereafter, on January 10, 1989, appellant timely filed a notice of appeal[3] and simultaneously filed a motion for new trial under Fed.R.Civ.P.Rules 59 and 60. Fed.R.Civ.P.Rule 59(b) provides that a motion for new trial under Rule 59 must be served no later than ten days after the entry of judgment.[4] The Court finds that because appellant's motion for new trial was not served within ten days of the December 12, 1988 order of the Bankruptcy Court, appellant's motion for new trial was untimely and therefore did not render the notice of appeal ineffective pursuant to Bankruptcy Rule 8002(b).[5] Further, the Court finds that appellant's intervening motion to alter or amend judgment filed on December 15, 1988, did not toll the time for filing the motion for new trial. Therefore, the Court concludes that appellant's

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[3] December 27, 1988 through January 10, 1989 is actually fourteen calendar days. However, when calculating the ten-day period for filing a notice of appeal prescribed by Bankruptcy Rule 8002(a), Bankruptcy Rule 9006(a) directs that if the period of time is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. Bankruptcy Rule 9006(a) (1987) (amended 1989). As a result, two Saturdays and two Sundays, making a total of four days, are excluded from the computation.

[4] Under Bankruptcy Rule 8002(b), a motion for new trial filed pursuant to Fed.R.Civ.P. Rule 60 (as incorporated by reference in Bankruptcy Rule 9024) does not affect the filing of a notice of appeal. Therefore, the Court will only consider what effect, if any, appellant's motion for new trial had under Fed.R.Civ.P. Rule 59 as it relates to the notice of appeal.

[5] Under Bankruptcy Rule 8002(b), a notice of appeal filed before the disposition of a *timely* Rule 9023 motion for new trial has no effect and a new notice of appeal must be filed.

untimely motion for new trial had no effect on appellant's original notice of appeal.

In sum, the appellant has properly noticed this appeal based on the following reasons: (1) appellee's timely motion to amend findings of fact and conclusions of law tolled the time period for filing a notice of appeal; (2) appellant, thereafter, timely noticed her appeal on January 10, 1989; and (3) appellant's motion for new trial was untimely and therefore had no effect on the appellant's original notice of appeal. Based on the foregoing, the Court concludes that the appellant has properly noticed her appeal and therefore the Court has jurisdiction to entertain this bankruptcy appeal pursuant to 28 U.S.C. §§ 158(a) and 1334.

B. *Factual Summary*

This is an appeal from a final order of the Bankruptcy Judge rendered pursuant to the provisions of 28 U.S.C. § 157 and presents questions of fact and law. While questions of fact will not be overturned unless clearly erroneous, the Court will review, *de novo*, the questions of law. *In re Texas Research, Inc.*, 862 F.2d 1161 (1989); *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir.1986). For clarity purposes, the Court will indulge in a brief summary of the underlying facts as stated in the Bankruptcy Court's findings of fact.

The appellant, Kelly P. Bradley, along with her husband, Scott Bradley, who is a practicing attorney, own several tracts of land in the north Texas area. One of the tracts, which is the subject of this appeal, is called "Paigebrooke Farm" and consists of approximately 129.47 acres

of rural property within the Town of Westlake, Texas. Appellant and her husband initially acquired the 129.47 acres through a partnership agreement entered into on December 30, 1977. The agreement provided that appellant would segregate and occupy as her homestead 15 acres of land situated in the center of the 129.47 acre tract. The agreement further provided that the remaining 114.47 acres would be used for investment and development purposes. Since March 1, 1978, the appellant used the Paigebrooke Farm as her family home, and in accordance with the partnership agreement, maintained the curtilage of the family home and out buildings within the 15 acre tract located approximately in the center of the Paigebrooke Farm. In 1982, the partnership was terminated and the appellant subsequently purchased the other partners' interest and became the sole owner of the Paigebrooke Farm. The physical characteristics of Paigebrooke Farm, however, remained essentially the same, except for some improvements to the buildings on the site.[6]

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[6] In his findings of fact, Judge Tillman commented on the physical characteristics of the appellant's property which the Court sets forth as follows:

> The improvements on Paigebrooke Farm include Debtor's house, a small foreman's house, an eight-stall horse stable with a tack and feed room, two storage sheds, another storage shed for hay, a chicken coop, two corrals and a chute for working cattle. Debtor's house is a ranch style dwelling. The perimeter of the farm is fenced in barbed wire, and there are three cattle guards installed in the ground. All gates on the property are of the type typically sold in farm and ranch stores. It is necessary to open a gate to enter into the property. The driveway from the road

In August 1985, the appellant and her spouse, Scott Bradley, entered into a loan transaction with Seguin Savings Association, predecessor-in-interest to Pacific Southwest Bank, F.S.B. (hereinafter "Seguin"). Pursuant to the loan agreement, Seguin agreed to loan to the appellant and her husband a sum in excess of $5,000,000.00. The primary collateral for the loan was a real estate development project consisting of approximately 200 acres of undeveloped real estate near Roanoke, Texas, together with the improvements to be constructed thereon with loan proceeds. In addition, the appellant and her spouse pledged the Paigebrooke Farm as secondary collateral for the loan pursuant to a third lien deed of trust executed in favor of Seguin. The parties, however, excepted from this third lien deed of trust some 15 acres of land which included and surrounded the appellant's actual home site on the Paigebrooke Farm. Additionally, the appellant and her husband executed and issued to Seguin on August 30, 1985, a homestead disclaimer wherein they expressed their intention to use only the 15 acres including and surrounding their home and farm buildings as their homestead.

On October 6, 1987, the appellant filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code, in part because Seguin posted the real estate development project and Paigebrooke Farm for foreclosure. Appellant filed schedules and statement of affairs in connection with the bankruptcy filing wherein

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adjoining Paigebrooke Farm to the Debtor's house is more than a third of a mile in length and is unpaved. Findings of Fact p. 3.

she claimed the Paigebrooke Farm as her homestead; however, the appellant's exemption of the Paigebrooke Farm contained in the schedules and statement of affairs was not objected to by any party.

On December 31, 1987, the underlying adversary proceeding was commenced by appellant's filing of a complaint to determine the validity of a lien and for equitable subordination. After the completion of the proceedings below, the Bankruptcy Court entered an order in conformity with the findings of fact and conclusions of law on December 12, 1988. The order concluded that the Paigebrooke Farm was rural in character and that the appellant never alienated nor abandoned her homestead rights to the property. The order further provided that the appellant was entitled to claim fifteen acres of land as her rural homestead under existing Texas law. The Bankruptcy Court subsequently entered an order for clarification purposes supplementing the original findings of fact and conclusions of law on December 27, 1988.

C. *Issues on Appeal*

The central issue raised by the appellant in her assignment of error is whether the Bankruptcy Court erred in limiting the appellant's rural homestead to the fifteen acres including and surrounding the appellant's dwelling. Specifically, appellant cites as error the Bankruptcy Court's findings of fact Nos. 40 and 59 in its findings of fact and conclusions of law where the Bankruptcy Court limited the appellant's homestead to 15 acres. Further, appellant asserts that the Bankruptcy Court erred in reaching findings of fact Nos. 60 through

64 in its supplemental findings of fact and conclusions of law by finding that appellant and her husband intended to use only 15 acres as their homestead. In addition, appellant contends that the Bankruptcy Court erred in making supplemental conclusions of law Nos. XIII and XIV.

As a threshold question, the Court must determine whether the Bankruptcy Court's finding of fact concerning the 15 acres of land said to contain the appellant's dwelling and out buildings was clearly erroneous.[7] A district court must affirm findings of the bankruptcy court unless they are clearly erroneous. *In re Texas Research, Inc., supra.* "The test for the district court . . . is not whether a different result would be appropriate, but whether there is sufficient evidence in the record to prevent clear error in the trial judge's findings." *In re Bardwell,* 610 F.2d 228 (5th Cir.1980); *see also* Bankruptcy Rule 8013.

In his findings of fact and conclusions of law and his supplemental findings of fact and conclusions of law, the Bankruptcy Judge found from the evidence that appellant's household and household effects were situated within a tract of land approximately fifteen (15) acres in size. The Court has carefully reviewed the transcript and the evidence of the proceedings below and has determined that the Bankruptcy Court could properly conclude from the evidence that the appellant's home and

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[7] This point of error combines two identical findings made by the Bankruptcy judge in No. 40 of his findings of fact and conclusions of law and No. 60 of his supplemental findings of fact and conclusions of law.

out buildings were located within the fifteen acre tract which the Bankruptcy Judge found to be appellant's homestead. Before the Bankruptcy Court was uncontroverted evidence showing that not only her home, but appellant's horse stables, storage sheds, corrals, and various other out buildings and improvements were all situated within the 15 acre perimeter surrounding and including appellant's homestead. While there was evidence presented that appellant maintained a hay meadow on approximately 17 acres of the Paigebrooke Farm and appellant's livestock were allowed to graze on the entire tract, there was not one scintilla of evidence before the Bankruptcy Court indicating that appellant's household or household effects extended beyond the 15 acre tract surrounding and including appellant's dwelling. Based upon the evidence as set forth above, the Court finds that there was sufficient evidence to support the Bankruptcy Court's factual finding that appellant's household and household effects were situated within a tract of land approximately fifteen acres in size. In so doing, the Court accepts the above factual finding of the Bankruptcy Court as not clearly erroneous.

The next issue raised by the appellant is whether the Bankruptcy Court erred in finding that the remaining 114.47 acres surrounding the 15 acre tract was vacant development property. While there is no evidence that commercial or residential development has occurred on Paigebrooke Farm since the appellant acquired the property in 1982, there is sufficient evidence to support the Bankruptcy Court's finding that the 114.47 acres was

vacant development property. Appellant and her husband initially acquired the property through a partnership agreement ostensibly created to market and develop the property for residential and/or commercial use. During the years following their acquisition of the Paigebrooke Farm, appellant and her husband took various steps to market the property for residential and/or commercial development including letters to prospective buyers advertising the property as "a major corporate headquarters campus," engaging an engineering firm to formulate plans for the development of the property into residential estates, and other substantive measures taken by the appellant and her husband to develop the property commercially. Although there was no evidence before the Bankruptcy Court that the appellant and her husband intended to farm the 114.47 acres in any significant way,[8]there was ample evidence to support the Bankruptcy Court's finding that the appellant and her husband sought to develop as residential and/or commercial property the outlying acres of the Paigebrooke Farm. Therefore, the Bankruptcy Court's finding shall not be set aside as clearly erroneous.

The third point of error the appellant raises on this appeal is whether the Bankruptcy Court erred in finding that the appellant and her husband intended to occupy only 15 acres of the 129.47 acres as their homestead as

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[8] The Bankruptcy Court found that farming and cattle operations on the Paigebrook Farm have resulted in some small financial rewards for the appellant and her husband; however, for the most part, these activities have resulted in losses for tax purposes.

reflected by their consistent written statements and by their actual use of only 15 acres. Before the Court reaches the merits of this issue, it would be appropriate to review Texas law as it applies to the appellant's homestead rights. As a general rule, bankruptcy courts resort to state law for interpretation of state homestead exemption rights. *In re Moody*, 77 B.R. 580, 590 (S.D.Tex.1987), *aff'd*, 862 F.2d 1194 (5th Cir.1989); *In re Barnhart*, 47 B.R. 277 (N.D.Tex.1985). In Texas, the state constitution and statutes have clearly established homestead exemption rights as a unique enclave to protect an individual's possession and enjoyment in property which is used as his or her home. *United States v. Rodgers*, 461 U.S. 677, 686, 103 S.Ct. 2132, 2138, 76 L.Ed.2d 236 (1983); *In re Claflin*, 761 F.2d 1088 (5th Cir.1985); *see generally* McKnight, *Homestead: Designation and Extent*, 36 Sw.L.J. 121 (1982). The homestead right is not a mere statutory entitlement, but a vested property right. *Williams v. Williams*, 569 S.W.2d 867 (Tex.1978).

Because protection of homestead rights is fundamental policy of Texas law, homestead exemption has commanded unusual deference. *In re Moody, supra; In re Claflin, supra*. For that reason, Texas courts have historically given a liberal construction to the state constitution and statutes protecting homestead exemptions. *Tollman v. Overstreet*, 590 S.W.2d 635, 637 (Tex.Civ.App.–Tyler 1979, no writ); *see also Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929).

The state constitution and statutes provide that one may claim as homestead property not more than one acre of urban property or in the case of rural property not more than 200 acres. Tex.Const.Ann.art. 16 § 51;

Tex.Prop.Code Ann. § 41.002 (Vernon Supp.1990).[9] It is well settled in Texas that the claimant has the burden to

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[9] The Court has reviewed the applicable constitutional and statutory provisions protecting the homestead. The Texas constitution provides:

> The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city , town, or village, shall consist of lot or lots amounting to not more than one acre of land, together with any improvements on the land; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

Tex.Const. art. XVI § 51. In accordance with the constitutional provision, the Texas Property Code further clarifies the definition of homestead and states as follows:

> (a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than one acre of land which may be in one or more lots, together with any improvements thereon.
>
> (b) If used for the purposes of a rural home, the homestead shall consist of:
>
> (1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or
>
> (2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.

establish the character of the property as homestead by showing a combination of both overt acts of homestead usage and the intention on the part of the owner to claim the land as a homestead. *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 314 (Tex.App.–Houston [14th Dist.] 1983, writ ref'd n.r.e.); *Prince v. North State Bank of Amarillo*, 484 S.W.2d 405, 409 (Tex.Civ.App.–Amarillo 1972, writ ref'd n.r.e.). Texas courts have held that "homestead usage" means that the property was used for purposes of the home, *Fajkus v. First Nat'l Bank of Giddings*, 735 S.W.2d 882, 884 (Tex.App.–Austin 1987, writ denied); *Sims v. Beeson*, 545 S.W.2d 262, 263 (Tex.Civ.App.–Tyler 1977, writ ref'd n.r.e.), and that actual use of the land as a homestead is the most satisfactory and convincing evidence of intention to put the land to homestead use. *Lifemark Corp. v. Merritt, supra.*[10] Once the claimant has established the

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(c) A homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection.

(d) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created.

Tex.Prop.Code Ann. § 41.002 (Vernon Supp. 1990) (formerly Tex.Prop.Code Ann. § 41.001).

[10] Texas courts have held that land is used for support of the family either by "cultivating it for income to be actually used for the purposes of the home, using it directly for the purposes of raising family supplies, or for cutting firewood or the like." *Sims v. Beeson*, 545 S.W.2d 262, 263 (Tex.Civ.App.–Tyler 1977, writ ref'd n.r.e.); *see also Fajkus v. First Nat'l Bank of Giddings*, 735 S.W.2d 882, (Tex.App.–Austin 1987, writ denied) (family cleared brush, planted grass and were grazing cattle on the property); *Clark v. Salinas*, 626 S.W.2d 118 (Tex.App.–Corpus

character of the property as homestead, the burden shifts to the creditor to disprove its continued existence. *Lifemark Corp. v. Merritt, supra* at 314. "The burden amounts to a presumption that the homestead continues until its termination is proved." *Id.*

To meet her initial burden of proof, the appellant must show a combination of both overt acts of homestead usage and intent to claim the land as homestead. Scott Bradley, the appellant's husband, testified at trial concerning the usage and intent of the appellant to claim the Paigebrooke Farm as their homestead.[11] In his testimony, Scott Bradley stated that the entire tract known as Paigebrooke Farm was used as ranching property. In addition, there was evidence presented that appellant maintained a hay meadow on approximately 17 acres of the Paigebrooke Farm and allowed her livestock to graze on this acreage.[12] Appellant contends that this

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Christi 1981, writ ref'd n.r.e.) (homestead was proven by use of property as residence or place to cultivate crops or cut firewood for the claimants personal consumption); *Braden v. McClure*, 603 S.W.2d 288 (Tex.Civ.App.–Amarillo 1980, no writ) (by owning, possessing, residing on and using the property as his home, claimant showed by overt action an intent to use such property as homestead); *Vaughn v. Vaughn*, 279 S.W.2d 427 (Tex.Civ.App.–Texarkana 1955, writ ref'd n.r.e.) (homestead parcel was used as an adjunct of the residence for the purpose of growing crops or a pasture for livestock).

[11] Because the appellant testified at trial that her intent with regard to the Paigebrooke Farm did not differ from that of her husband, the Court will accept Scott Bradley's testimony as evincing the appellant's usage and intent to claim the property as homestead. Tr. p. 146.

[12] The Bankruptcy Court found, however, that livestock and the hay meadow had been located on the farm for many years before the appellant acquired the property.

testimony conclusively established that the 144.47 acre tract in controversy was used as her homestead. While these facts concerning appellant's use of the property are undisputed, this evidence, at most, created a fact issue regarding the usage and intention of the appellant to claim the property as a part of the rural homestead. As such, the Court must determine whether the Bankruptcy Court's finding of fact was clearly erroneous. The Fifth Circuit has directed that a finding of fact is clearly erroneous "'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 818 F.2d 1135, 1142 (5th Cir.1987), *citing United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

After a careful review of the record, the Court finds that the record is replete with evidence showing that the appellant and her husband never intended to claim the outlying acreage as their homestead. On December 30, 1977, the appellant and her husband entered into a partnership agreement which stated that the partners would hold the property for investment and development purposes. Further, the partnership agreement provided that the appellant and her husband would occupy as their homestead only the 15 acre tract on which the home and out buildings are currently located. From 1977 to the present date, the appellant and her husband sought assiduously to market the property for development by sending letters to prospective buyers, advertising the property, and engaging an engineering firm to develop plans for residential estates. On February 28, 1985, in an unrelated loan transaction, the appellant and her spouse executed a homestead disclaimer wherein they represented that the 114.47 acres was not their homestead. On August 26,

1986, Scott Bradley claimed only one acre of the 129.45 acres as their homestead in a letter addressed to the Tarrant County Appraisal District. On January 28, 1987, Scott Bradley claimed only one acre of property as his homestead in a letter addressed to the Keller Independent School District. On August 20, 1985, appellant and her husband executed and issued to Seguin a homestead disclaimer and affidavit in which they represented that the 114.47 acres mortgaged to Seguin was not part of their homestead.

Based upon the foregoing, the Court finds that there was sufficient evidence in the record for the Bankruptcy Court to determine that the appellant intended to use the property, not as homestead, but as development property for residential and/or commercial use. The Bankruptcy Court resolved the factual issue regarding the appellant's usage and intent to claim the property as homestead against the appellant, and, in view of the evidence before the Court, the Court finds that the evidence sufficiently supports the trial court's findings. Because the Bankruptcy Court correctly found that the appellant and her husband intended to occupy only 15 acres of the 129.47 acres as their homestead as reflected by their consistent written statements and by their actual use of only 15 acres, and that the 114.47 acres had not been used by the appellant with the intention of claiming the property as their rural homestead, the Court concludes that the findings by the Bankruptcy Court were not clearly erroneous and hereby AFFIRMS the Bankruptcy Court's findings.

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
KELLY P. BRADLEY aka/dba KELLY PACE BRADLEY	§	CASE NO. 487-42772-11
DEBTOR	§	
KELLY P. BRADLEY aka/dba KELLY PACE BRADLEY	§	
PLAINTIFF	§	
VS.	§	ADVERSARY
SEGUIN SAVING ASSOCIATION	§	NO. 487-4434
DEFENDANT	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Entered Dec. 12, 1988)

At Fort Worth, Texas, in said district.

On November 9, 1988 came for trial the above styled and numbered adversary proceeding. After hearing the testimony and evidence presented and the arguments of counsel, the Court FOUND AND DETERMINED as follows:

FINDINGS OF FACT

1. Kelly Bradley aka/dba Kelly Pace Bradley ("Debtor") is a married adult.

2. Bradley owns several tracts of land in the north Texas area, including an approximately 129.5 acre tract of land

located in the Town of Westlake at Route 1, Box 15, Roanoke, Texas 76262.

3. Debtor has referred to this tract as "Paigebrooke Farm." Debtor, her spouse and other family members reside there.

4. In August, 1985, the Debtor and her spouse entered into a loan transaction with Seguin Savings Association ("Defendant"), the Defendant herein.

5. Pursuant to the loan transaction, Defendant agreed to loan the Debtor and her spouse a sum exceeding $5,000,000.00.

6. The primary collateral for that loan was a real estate development project consisting of approximately 200 acres of undeveloped real estate near Roanoke, Texas, together with the improvements to be constructed thereon with the loan proceeds.

7. As secondary collateral, Debtor and her spouse pledged Paigebrooke Farm and excepted from the Deed of Trust some 15 acres of land including and surrounding the actual house site on the farm. Debtor and her spouse executed a homestead waiver affidavit prepared by and for the benefit of Defendant.

8. In October, 1987, Debtor filed a voluntary Bankruptcy petition, in part because Defendant posted the real estate development project and Paigebrooke Farm for foreclosure.

9. The Debtor's Schedules and Statement of Affairs reflected that Debtor had claimed Paigebrooke Farm as her homestead.

10. No party has ever objected to the claim of exemptions of the Debtor.

11. Since the time of acquisition, the Debtor has used Paigebrooke Farm as her home or domicile and has resided on Paigebrooke Farm with her family since March 1, 1978.

12. When Debtor and her spouse moved into the house on Paigebrooke Farm, they intended to make the property their permanent home.

13. Since acquiring Paigebrooke Farm, the Debtor and her spouse have not claimed any other property as their homestead.

14. Neither Debtor nor her spouse ever abandoned their homestead rights in Paigebrooke Farm.

15. Paigebrooke Farm is located within the community limits of Westlake, Texas.

16. No commercial or residential development has occurred on Paigebrooke Farm since the Debtor acquired the property.

17. The physical characteristics of Paigebrooke Farm have remained essentially the same since Debtor and her spouse acquired the property, except for some improvement to the buildings on the site.

18. The improvements on Paigebrooke Farm include Debtor's house, a small foreman's house, an eight-stall horse stable with a tack and feed room, two storage sheds, another storage shed for hay, a chicken coop, two corrals and a chute for working cattle. Debtor's house is a ranch style dwelling. The perimeter of the farm is fenced

in barbed wire, and there are three cattle guards installed in the ground. All gates on the property are of the type typically sold in farm and ranch stores. It is necessary to open a gate to enter into the property. The driveway from the road adjoining Paigebrooke Farm to the Debtor's house is more than a third of a mile in length and is unpaved.

19. Debtor has continuously raised and cut hay on Paigebrooke Farm since 1978. Hay was grown on the farm for many years prior to the acquisition of the property by Debtor.

20. Cattle are kept, raised and/or grazed on Paigebrooke Farm. Cattle have been located on the property before the acquisition of the property by Debtor. Debtor and her spouse have bought and sold cattle since they acquired the farm.

21. Horses, cattle, geese, chickens, pigs, goats, guineas, pea fowl and rabbits are or have been kept, raised and/or grazed on Paigebrooke Farm within the last three years. Debtor has bred and sold horses and cattle, and have used eggs produced on the farm for her personal use and she has also sold some eggs. At least part of the livestock has been used as food for Debtor's family.

22. Hunter/jumper horse shows have been held on Paigebrooke Farm by the Debtor.

23. Paigebrooke Farm has historically been used for cattle grazing. The cattle are watered from a stock tank located on the farm.

24. On August 30, 1985, Debtor and her spouse owned various farming implements which were used in connection with Paigebrooke Farm, including a tractor, a brush mower, a horse trailer and a flat bed utility tractor and miscellaneous equipment for feeding, watering and caring for animals.

25. The house and land surrounding the house have consistently been used for agricultural, ranching, and homestead purposes since the date of acquisition by Debtor.

26. Debtor and her spouse filed an assumed name registration in the Tarrant County Clerk's office in 1983 for the name "Paigebrook (sic) Farm."

27. The Debtor and her spouse have filed Schedule F (Farm Income) to their Form 1040 federal income tax returns each year since their acquisition of Paigebrooke Farm.

28. Debtor and her spouse have kept Paigebrooke Farm registered with the USDA Soil Conservation Service in Tarrant County since 1978.

29. Farming and cattle operations on Paigebrooke Farm have resulted in some small financial rewards for the Debtor and her spouse; however, for the most part, these activities have resulted in losses for tax purposes.

30. The lack of profitability of farming operations conducted on Paigebrooke Farm has not altered the physical character of the land.

31. Debtor receives favorable real estate tax treatment due to the agricultural exemption on the property.

32. The roads adjacent to Paigebrooke Farm are narrow country roads without curbs, sidewalks or storm sewers.

33. The Circle T Ranch, consisting of about 3,000 acres, surrounds Paigebrooke Farm on three of its four sides and has been used for cattle grazing, the keeping of horses and other livestock, and the production of hay since at least 1971.

34. Debtor's closest neighbor is about one-half mile in distance "as the crow flies", but more than 1.25 miles by car or by foot

35. Debtor's children attended schools in Keller from 1978 until their graduation, more than five miles south of Paigebrooke Farm.

36. Paigebrooke Farm receives no services from Westlake. The Debtor has butane delivered for use in her house and electricity is furnished by a rural electric cooperative. The farm has its own water well and storage tank which provides water for the use of Debtor's family and the livestock.

37. Westlake was purported to incorporate in 1956.

38. Westlake comprises more than 6.5 square miles and has a population of less than 150 people.

39. The entire 129.47 acres have been within the city limits of Westlake, Texas since the property was purchased by Scott Bradley.

40. Out of the 129.47 acres, Plaintiff's household and household effects are situated within a tract of land approximately fifteen (15) acres in size.

41. There are 33 homes and about the same number of barns in Westlake, most of which were built more than thirty years ago. Most of the properties have been granted agricultural exemptions from ad valorem taxation.

42. Westlake has no considerable aggregation of people living in close proximity and its "residents" are scattered over the area, engaged in agricultural pursuits, or some similar avocations, requiring a considerable area of territory for its support.

43. There is not a unity and proximity between habitations, nor is there a compact center or nucleus of population around which Westlake had developed. There are long distances between houses. Homes are separated in some instances by as much as 1.5 miles from neighboring homes. There are no clusters of house [sic] in close proximity to each other.

44. There are no "lots" in Westlake having less than a full acre. Since the purported incorporation of Westlake, only seven homes have been constructed, each on at least ten acres.

45. Most of the residents of Westlake maintain cattle or horses or both on the acreage surrounding their homes.

46. On August 30, 1985, all roads within Westlake were narrow two lane asphalt country roads; there were no sidewalks or storm sewers; and Westlake claims jurisdiction over none of these roads and provided no maintenance. Maintenance is performed irregularly by Tarrant County. Speed limits are not determined by Westlake;

rather they are set by the State or the County. Westlake has no traffic signal lights.

47. Westlake has no town hall, property, park, marshall, building inspector, health officer or paid employees. The mayor's wife is the town secretary and all town records are kept in the mayor's home, which is located on a 20-acre tract where cattle are grazed. The mayor's gate is generally locked unless a visitor is expected. The Board of Aldermen meetings are held not more than monthly, at the Dudley Ranch.

48. On August 30, 1985, Westlake had no grocery stores, churches, restaurants, theatres, libraries, cleaners, hardware stores, clothing stores, professional officers, manufacturing facilities, retail establishments or commercial businesses of any kind, except for farming and ranching operations. Westlake is predominately a ranching community.

49. Westlake furnishes no water, electricity, natural gas or other utility service; and the community does not furnish garbage pickup for the residents. Gas and garbage pick up are furnished directly to individual residents by private contractors.

50. Except for a few homes connected to a water system constructed by Keller Rural Water Cooperative, all homes in Westlake have their own water wells and distribution systems. All homes have individual septic tanks for sanitary sewerage.

51. Westlake does not furnish fire or police protection and Westlake does not own a police car or fire truck, nor does it employ firemen or policemen. Fire protection is

furnished by a volunteer fire department which covers an area much larger than the incorporated limits, and police protection is provided by the regular employees of the Tarrant County Sheriff's office.

52. Westlake is not served by any public transit. The children in the area attend schools in three different school districts.

53. Westlake does not levy any taxes.

54. Mail is received in Westlake by rural delivery from the Roanoke post office and mail deliveries are addressed to a resident by rural route and box number at "Roanoke, Texas 76262."

55. The are receives telephone service from the telephone exchange in Roanoke.

56. If Westlake were not in existence, the residents of the area would have no fewer services available to them than they have with this town in existence.

57. On August 30, 1985, IBM Corporation had not constructed any facilities in Westlake, nor had it received plat approval for any development. Since 1987, several buildings have been constructed on the Westlake site, but the nearest building is 1.5 miles from Debtor's home. The IBM construction is not visible from Paigebrooke Farm. The intent of the developer was to place a corporate office campus in a rural setting. Westlake ordinances prohibit coverage in excess of ten (10%) percent of the land.

58. On the date of the loan transaction with Defendant, Paigebrooke Farm would properly be characterized as undeveloped rural land.

59. Because the Debtor has neither alienated nor abandoned her homestead rights, she is entitled to claim 15 acres of land as her rural homestead under existing Texas law.

CONCLUSIONS OF LAW

I.

Historically, the Texas homestead exemption has commanded unusual deference. Protection of homestead rights is a fundamental policy of Texas law. *In re Moody*, 77 B.R. 580 (S.D. Tex. 1987); *Commonwealth National Bank v. United States*, 573 F.Supp. 881 (N.D. Tex. 1983). *In re Niland*, 825 F.2d 801 (5th Cir. 1987).

II.

The homestead right constitutes an estate in land rather than a mere privilege of exemption or possession. *Andrews v. Security National Bank of Wichita Falls*, 121 Tex. 409, 50 S.W.2d 153 (1932).

III.

Generally speaking, Bankruptcy Courts resort to state law for an interpretation of state exemption rights and homesteads. *In re Moody, supra; In re Barnhart*, 47 B.R. 277 (Bankr. N.D. Tex. 1985).

IV.

Article XVI, Section 51 of the Texas Constitution provides that:

"The homestead not in a town or city, shall consist of *not more* than 200 acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village shall consist of a lot or lots amounting to no more than one acre of land, together with any improvements on the land; provided that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired." (Emphasis added).

The Texas Property Code further clarifies the definition of Texas Homestead. Section 41.002 provides:

"(a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead or a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than one acre of land which may be in one or more lots, together with any improvements thereon.

(b) If used for the purposes of a rural home, the homestead shall consist of:

(1) for a family, *not more than* 200 acres, which may be in one or more parcels, with the improvements thereon; or

(2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres which may be in one or more parcels, with the improvements thereon.

(c) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created." (Emphasis added).

V.

Ordinarily, whether homestead land has rural or urban character is a question of fact unless the facts and circumstances are such that reasonable minds cannot differ. *In re Moody, supra. Aetna Ins. Co. v. Ford,* 417 S.W.2d 448 (Tex.Civ.App.-Eastland 1967), *rev'd on other grounds,* 424 S.W.2d 612 (Tex. 1968), *First State Bank of Grapeland v. Brown,* 490 S.W.2d 248 (Tex.Civ.App.-Tyler 1973, no writ); *Kimmey v. Goodrum,* 346 S.W.2d 901 (Tex.Civ.App.-Waco 1961, *writ ref'd. n.r.e.*).

VI.

To establish homestead rights, the evidence must demonstrate a combination of overt acts of homestead usage and the intent of the owner to claim the land as homestead. *Sims v. Beason,* 545 S.W.2d 262, 263 (Tex.Civ.App.-Tyler 1976, *writ ref'd n.r.e.*).

VII.

According to many courts, actual use of land as a homestead is the most satisfactory and convincing evidence of intention to put land to homestead use. *Lifemark Corp. v. Merritt,* 655 S.W.2d 310 (Tex.App.-Houston [14th Dist.] 1983, *ref'd. n.r.e.*); *Spence v. Spence,* 455 S.W.2d 365, 368 (Tex.Civ.App.-Houston [14th Dist.] 1980, *writ ref'd n.r.e.*); *Clark v. Salinas,* 626 S.W.2d 118 (Tex.Civ.App.-

Corpus Christi 1981), *writ ref'd n.r.e.*, 628 S.W.2d 31 (Tex. 1982).

VIII.

The initial burden of proving the existence of a homestead is on the homestead claimant. *Burk Royalty Co. v. Riley*, 475 S.W.2d 566 (Tex. 1972); *Pace v. McEwen*, 617 S.W.2d 816 (Tex.Civ.App.-Houston [14th Dist.] 1981, *no writ*). However, once the claimant of homestead protection has established his claim, the burden shifts to the creditor seeking turnover of the homestead in satisfaction of a judgment to disprove its continued existence. *Lifemark v. Merritt, supra* at 314.

IX.

The shift of burden creates a presumption that the homestead continues to exist until its termination is proved. *Sullivan v. Barnett*, 471 S.W.2d 39, 43 (Tex. 1971).

X.

In Texas, homestead rights may only be lost through death, abandonment or alienation. *Long Bell Lumber Co. v. Miller*, 240 S.W.2d 405 (Tex.Civ.App.-Amarillo 1951, *no writ*); *Hollifield v. Hilton*, 515 S.W.2d 717 (Tex.Civ.App.-Ft. Worth 1974, *writ ref'd n.r.e.*).

XI.

Under Texas law, no set formula exists to label land as rural or urban. Courts have examined and balanced

many factors. Although the location of a homestead is a factor, it is not determinative of whether the character of the land is rural or urban. A rural homestead may be situated entirely or partially within the corporate limits of a city, town or village, and an urban homestead may be located outside of the corporate limits. *Aetna Ins. Co. v. Ford,* 417 S.W.2d 616 (Tex.Civ.App.-Eastland 1967) *rev'd. on other grounds,* 424 S.W.2d 616 (Tex. 1968).

XII.

The property in question is in the sparsely populated community of Westlake, Texas. As defined by the Texas Supreme Court in *Needham v. Wilbanks,* 595 S.W.2d 849 (Tex. 1980) *rehearing den.,* Westlake is not a "town" because it has no compact center or nucleus of population, is rural in character and appearance and does not and is not capable of receiving municipal services on any reasonable basis. Because Westlake is not a "town", it cannot be incorporated and any attempt to do so is invalid. *Needham v. Wilbanks, supra;* VERNON'S ANN. CIV. ST., ART. 966.

XIII.

Even assuming that Westlake is a "town", location within a town or village is only one factor to consider in determining the character of the property. *Jones v. First National Bank,* 259 S.W.2d 157, 159 (Tex. 1924); *Iken & Co. v. Olenick,* 42 Tex. 195 (1875).

XIV.

The character of the land in close proximity to the claimed homestead, as well as the occupations of those living in the surrounding areas, are probative of the tract's rural or urban characteristics. *Commerce Farm Credit Co. v. Sales,* 288 S.W.2d 802 (Tex.Comm.App. 1926, *holding approved*).

XV.

The use or non-use of city services such as fire, police, school and water is also probative of the land's character. *Commerce Farm Credit Co. v. Sales, supra* at 804.

XVI.

An urban area generally consists of an aggregation of inhabitants and a collection of dwellings and other buildings. *Purdy v. Grove,* 35 S.W.2d 1078 (Tex.Civ.App.-Eastland 1931, *writ ref'd*); *Vistron Corp. v. Winstead,* 521 S.W.2d 754 (Tex.Civ.App.-Eastland 1975, *no writ*).

XVII.

The testimony at the hearing was that a substantial number of cattle were or have been grazing on the Paigebrooke Farm, thereby supporting the Debtor's assertions that the land was used for rural activities. The Debtor's financial station in life may have rendered it unnecessary for her to derive sole financial support from the land. However, this fact alone does not convert rural property to urban land. As the Texas Supreme Court noted in *Posey v. Bass,* 77 Tex. 512, 14 S.W. 156 (1890):

> "It is the *place* of the homestead that gives character to it, not the business of the head of the family. If it be in the country it is a rural homestead, if it be in a city it is an urban residence. (Emphasis supplied.)

XIX.

In the case of *Aledo State Bank and Northwest Bank v. Melvin Wilburn Prince and Barbara Jean Prince,* Adversary No. 482-0438 (Bankr. N.D. Tex. 1984), Judge McConnell of this Court wrote a Memorandum Opinion dated June 8, 1984 in a case involving substantially similar facts and in holding that the property involved in that case constituted a rural homestead, held, in part:

> "It is not necessary that the Debtors derive a substantial portion of their income from the property to permit its claim as rural homestead. The only requirement is that the land be used by the claimants in connection with the family residence for the support, comfort and convenience of the family as noted in *Pridgen v. Warren,* 15 S.W. 559, 560 (Tex. 1891). Clearly, the Debtors have shown that they have made and are making such use of their property." . . . "Although the courts of Texas have sought to 'prevent this most valuable right from being converted into an instrument of fraud' with respect to the claims of creditors the Supreme Court has followed the generally accepted rule that homestead laws are to be liberally construed to effectuate their beneficent purpose,".

XX.

The Debtor has successfully demonstrated to this Court that the Paigebrooke Farm was rural property

which was purchased with the intent to use such property as homestead. Once the presumption that a rural homestead is established, that presumption continues until rebutted by competent evidence. Defendant has failed to present sufficient evidence to demonstrate that on the date Defendant obtained a junior, non-purchase money Deed of Trust lien on the Paigebrooke Farm the property had changed its character from rural to urban.

XXI.

The Court, therefore, concludes that the subject tract, the Paigebrooke Farm, is rural land for the purpose of the Texas Constitutional Homestead Exemption and, therefore, the Debtor is entitled to claim fifteen (15) acres for a family homestead.

XXII.

Where appropriate, Findings of Fact shall be considered Conclusions of Law and vice versa.

SUMMARY

Based on the foregoing Findings of Fact and Conclusions of Law, it is appropriate for this Court to find in favor of Debtor/Plaintiff, Kelly P. Bradley aka/dba Kelly Pace Bradley, and against Defendant, Seguin Savings Association.

All relief not expressly granted herein is denied.

This Court shall entered [sic] an Order in conformity with the Findings of Fact and Conclusions of Law entered herein this date.

IT IS SO ORDERED.

SIGNED this 9th day of December, 1988.

/s/ Massie Tillman
MASSIE TILLMAN
UNITED STATES
BANKRUPTCY JUDGE

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	CASE NO.
KELLY P. BRADLEY aka/dba KELLY PACE BRADLEY	§	487-42772-11
DEBTOR	§	ADVERSARY NO. 487-4434
KELLY P. BRADLEY aka/dba KELLY PACE BRADLEY	§	
PLAINTIFF	§	
VS.	§	
SEGUIN SAVINGS ASSOCIATION	§	
DEFENDANT	§	

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Entered Dec. 27, 1988)

On December 13, 1988 this Court entered Findings of Fact and Conclusions of Law and an Order in the above styled and numbered adversary proceeding pursuant to the trial held on November 9, 1988. The Court, after finding that there is confusion surrounding the ruling of 15 acres as the rural homestead rather than 129.47 acres as the rural homestead, enters the following supplemental Findings of Fact and Conclusions of Law:

SUPPLEMENTAL FINDINGS OF FACT

60. Out of the 129.47 acres, Plaintiff's household and household effects are situated within approximately 15 acres.

61. The remainder of the 129.47 acres, other than the 15 acres on which Plaintiff's household and out building are situated, is vacant development property.

62. Plaintiff and her husband initially acquired the 129.47 acres through a partnership agreement dated December 30, 1977. The agreement provided that Plaintiff would segregate and occupy as her homestead 15 acres of the 129.47 acres, on which Plaintiff's household and out buildings are now situated, and use the remainder of the property for investment and development purposes. Plaintiff subsequently purchased the other partners' interests and is now the sole owner of all partnership interests.

63. Plaintiff and her husband also expressed their intention to use only the 15 acres as their homestead in a Homestead Disclaimer issued to Allied Bank on February 28, 1985.

64. Plaintiff and her husband further expressed their intention to use only the 15 acres as their homestead in a Homestead Disclaimer and Designation issued to Defendant on August 30, 1985.

SUPPLEMENTAL CONCLUSIONS OF LAW

XXIII.

Plaintiff and her husband have utilized only 15 acres of the 129.47 acres as their homestead.

XXIV.

Plaintiff and her husband intended to occupy only 15 acres of the 129.47 acres as their homestead as reflected by their consistent written statements since the property was acquired and by their actual use of only 15 acres.

XXV.

Due to Plaintiff's and her husband's actual usage and intention to use only 15 acres of the 129.47 acres, their homestead exemption cannot exceed the 15 acres.

SUMMARY

Based on the foregoing Supplemental Findings of Fact and Conclusions of Law and upon the Findings of Fact and Conclusions of Law entered on December 13, 1988, it is appropriate for this Court to find in favor of Debtor/Plaintiff, Kelly P. Bradley aka/dba Kelly Pace Bradley, and against Defendant, Seguin Saving Association.

All relief not expressly granted herein is denied.

This Court has entered an Order in conformity with the Findings of Fact and Conclusions of Law and with the Supplemental Findings of Fact and Conclusions of Law

on December 13, 1988 which remains in full force and effect.

IT IS SO ORDERED.

SIGNED this 23 day of Dec., 1988.

/s/ Massie Tillman
MASSIE TILLMAN
UNITED STATES
BANKRUPTCY JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1031

IN THE MATTER OF: KELLY P. BRADLEY,

DEBTOR,

KELLY P. BRADLEY,

Appellant,

versus

PACIFIC SOUTHWEST BANK, FSB,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 5/13/92, 5 Cir., 1992, ___ F.2d ___)

(June 18, 1992)

Before KING, JOHNSON, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX F

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

12 U.S.C. § 1823(e) as Amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement –
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

Article XVI, Section 50 of the Texas Constitution as Amended in 1973 provides:

> The homestead of a family, or of a single adult person, shall be, and is hereby protected from

forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of a homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, giving in such manner as may be prescribed by law. No mortgage, trustee, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trustee, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of the feasance shall be void. This amendment shall become effective upon its adoption.

Article XVI, Section 51 of the Texas Constitution as Amended in 1983 provides:

> The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; homestead in a city, town or village, shall consist of lot or lots amounting to not more than one acre of land,

together with any improvements on the land; provided, that the same shall be used for the purpose of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

Tex. Prop. Code Section 41.001 as Amended in 1985 provides:

(a) a homestead in one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.

(b) Encumbrances may be properly fixed on homestead property for:

(1) purchase money;

(2) taxes on the property; or

(3) work and material used in constructing improvements on the property if contracted for in writing before the material is furnished or the labor is performed and in a manner required for the conveyance of a homestead, with joinder of both spouses if the homestead claimant is married.

MATERIAL EXCERPTS FROM RECORDS OF SEGUIN SAVINGS ASSOCIATION

Excerpt from Homestead Disclaimer and Designation of Scott Bradley and Kelly P. Bradley dated August 30, 1985:

> BEFORE ME, the undersigned authority, on this day personally appeared SCOTT BRADLEY and wife, KELLY PACE BRADLEY, known to me to be the people whose names are subscribed hereunto, who being by me duly sworn, upon oath did depose and say:
>
> THAT we have this day executed a Deed of Trust to JOHN H. DALTON, Trustee, for SEGUIN SAVINGS ASSOCIATION, Beneficiary, to secure the payment of a Note dated August 30, 1985, in the principal sum of FIVE MILLION THREE HUNDRED FIFTY THOUSAND AND N0/100 DOLLARS ($5,350,000.00) upon the following described property, to-wit:
>
> * * *
>
> As an inducement to make said loan, we represent that the property described in said Deed of Trust and hereinabove described is not part of our homestead; that we do not now use or occupy same, or any part thereof, and have no intention of ever using or occupying same, or any part thereof, as our homestead.
>
> * * *
>
> [Signature]
>
> SCOTT BRADLEY
>
> [Signature]
>
> KELLY PACE BRADLEY

SUBSCRIBED AND SWORN to, before me, on this 30th day of August, 1985.

[Signature]

Notary Public, State of Texas

Linda May Hamum

Typed or Printed Name

My Commission Expires: 10/31/88

Excerpts from Jenkens & Gilchrist August 30, 1985, opinion letter to Seguin Savings Association:

Seguin Savings Association
116 North Camp Street
Seguin, Texas 78155

Re: Scott Bradley d/b/a Paigebrook Development Company

Gentlemen:

We are counsel to the above referenced party (the "Borrower"). The Borrower and Seguin Savings Association (the "Lender") have entered into an agreement under the terms of which the Lender is to make available up to FIVE MILLION THREE HUNDRED FIFTY THOUSAND DOLLARS ($5,350,000) (the "Loan") to the Borrower for the purpose of financing certain property located in Denton County, Texas, and the development of a subdivision to be known as "Brookstone II,"

including streets and utilities and related improvements. As further collateral for the Loan, the Borrower is executing a Deed of Trust with respect to 114.47 acres of land which will be carved from a 129.47 acre tract owned by the Borrower and his wife, Kelly Pace Bradley, which is situated in the Town of Westlake, Tarrant County, Texas. The Borrower and his wife occupy the remaining 15 acres and claim the same as their homestead. The Borrower and his wife have executed a certain homestead Disclaimer and Designation in connection therewith.

From our investigation, it appears that all of the 129.47 acre tract is located within the incorporated city limits of the Town of Westlake and was so located at the time such property was acquired by the Borrower and his wife. Having examined the Homestead Disclaimer and Designation and considered such other matters as we deemed appropriate, we are of the opinion that no part of the 114.47 acre tract constitutes any part of the homestead of the Borrower or his wife.

Very truly yours,

JENKENS & GILCHRIST

By: [Signature]
Wilson A. Hanna
Partner

(2)

Supreme Court, U.S.
FILED
FEB 16 1993
CLERK OF THE

No. 92-840

In The

Supreme Court of the United States

October Term, 1992

PACIFIC SOUTHWEST BANK, F.S.B.,

Petitioner,

vs.

KELLY P. BRADLEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

Whether the doctrine announced in *D'Oenche Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and its statutory codification in 12 U.S.C. § 1823(e), vitiates the long-standing real defense of homestead established under the Texas Constitution and Texas law.[1]

---

1. Upon information and belief, since the filing by the Petitioner of its Petition for Writ for Certiorari, the subject note and lien have been transferred to Commonwealth Land Title Insurance Company ("Commonwealth"), Petitioner's title insurance underwriter, as part of a settlement between Commonwealth and Petitioner. Thus, Petitioner may no longer be the owner and holder of the subject note and lien. Respondent disagrees that the *D'Oenche Duhme* doctrine so heavily relied upon by Petitioner is at all applicable to this case. However, if Commonwealth is now the true owner and holder of the note and lien, since Commonwealth is not an insured depository institution within the federal banking statutes, if the Court finds merit in any of Petitioner's arguments, Commonwealth should be directed to file a brief demonstrating why it should be entitled to the benefits of *D'Oenche Duhme* and its codification. For purposes of this Brief, however, Respondent will address the questions presented in this brief as if no assignment to Commonwealth had occurred.

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No. 92-840

In The

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October Term, 1992

PACIFIC SOUTHWEST BANK, F.S.B.,

Petitioner,

vs.

KELLY P. BRADLEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Statement of Facts

In 1977, Kelly P. Bradley ("Bradley" or "Respondent") and her husband bought a farm consisting of 129.47 acres in Westlake, Texas which they named "Paigebrooke Farm." Title was taken in the Bradleys' name only although several acquaintances helped the Bradleys finance the acquisition. Bradley and her family immediately moved onto the farm and began using it as their home and as a ranch. Deciding that they permanently wanted the entire Paigebrooke Farm as their home, they paid off all of the

individuals who helped finance the acquisition by late 1982 or early 1983. The Bradleys have exclusively owned all of Paigebrooke Farm since that time. (R. Vol. 5, at 27-28, 60-61, 123 and Vol. 6, T. at 53).[2] As the Fifth Circuit held below, "Bradley has satisfied her burden to establish the homestead character of her farm as a matter of law." *Bradley v. Pacific Southwest Bank, FSB*, 960 F.2d 502, 508 (5th Cir. 1992). Petitioner has not questioned this holding. Therefore, Respondent will not reiterate all of the homestead facts supporting the Fifth Circuit's determination.

On August 30, 1985, Bradley and her husband executed a third lien deed of trust which purported to create a lien upon 114.47 acres of the 129.47 acre Paigebrooke Farm for the benefit of Seguin Savings Association ("Seguin"), predecessor-in-interest to Petitioner. The deed of trust was given as additional collateral to secure the payment of a note dated August 30, 1985, in the principal amount of $5,350,000.0, from Bradley and her husband to Seguin. As primary collateral for the loan, Bradley and her husband granted Seguin a deed of trust on approximately 200 acres of separate land in Denton County, Texas, which was held for commercial development. The Seguin loan was specifically made for the purpose of developing this separate 200-acre tract (R. Vol. , T. at 60-61, 64-65).

Seguin was aware at the time it made the loan to the Bradleys that Bradley and her family used Paigebrooke Farm as their home and ranch.[3] Seguin further recognized that Paigebrooke Farm

---

2. Citations to the original papers or pleadings filed in the bankruptcy and district courts will be referred to as "R." followed by the page number to which reference is made. Transcripts within a record volume will be referred to as "T." followed by the page number to which reference is made.

3. Respondent is not arguing in this brief that constructive knowledge should be imputed to the FSLIC and its assignee, Petitioner. Respondent is simply pointing out the facts from the record.

might legally constitute Bradley's homestead, but it decided to assume the risk that the lien could be void. Seguin tried to minimize this risk by requiring the Bradleys to sign a homestead disclaimer and designation stating that only 15 acres of Paigebrooke Farm constituted their homestead and that the 114.47 acres of the farm to be pledged to Seguin were not part of the Bradleys' homestead. (R. Vol. 5, T. at 66-67 and R. Vol. 6, T. at 13-14, 16, 18, 21, 25-26, 34-35.)

The Bradleys executed the homestead disclaimer and designation requested by Seguin. They did so based upon Bradley's husband's mistaken belief that under Texas law, because Paigebrooke Farm was located within the incorporated town of Westlake, it would necessarily be categorized as urban land and, therefore, the Bradleys would only be entitled to one acre of Paigebrooke Farm as their homestead. (R. Vol. 5, T. at 67-68, 70-71.)

B. Course of Proceedings and Disposition Below

Bradley originally filed an adversary complaint against Seguin requesting, *inter alia*, that the bankruptcy court avoid Seguin's alleged lien against the Paigebrooke Farm. On November 9, 1988, a trial on the merits was held before the bankruptcy court. At trial, Seguin primarily attempted to prove that the property in issue was urban rather than rural. By Orders entered December 12, 1988, the bankruptcy court, *inter alia*, found that the Paigebrooke Farm was rural in character, and held that Bradley had never alienated or abandoned her homestead rights to the subject property but was only entitled to claim fifteen (15) acres of Paigebrooke Farm as her rural homestead. (R. 269, 271-76, 278-79.)

Bradley moved the bankruptcy court to alter or amend its judgment to declare that the entire farm was homestead property

(R. 281-88), and Seguin moved the bankruptcy court to amend the judgment to hold that the farm was urban property. (R. 289-93.) On December 27, 1988 based upon its Supplemental Findings of Fact and Conclusions of Law, as well as the previously entered Findings of Fact and Conclusions of Law, the bankruptcy court further stated that it was appropriate for the bankruptcy court to find *in favor of Bradley* and against Seguin. (R. 297, 298.) This comment is inexplicable given that the result of the ruling was to allow Seguin's secured claim to encumber all the property against which it claimed a lien.

On or about December 29, 1988, the Federal Home Loan Bank Board appointed the Federal Savings & Loan Insurance Corporation ("FSLIC") as receiver for Seguin and transferred the assets of Seguin to Pacific Southwest Bank, FSB, Petitioner herein ("Pacific" or "Petitioner"). (R. 657.)

On May 22, 1989, Pacific filed its Motion to Intervene and for Substitution. On June 2, 1989, the bankruptcy court entered an Agreed Order granting Pacific Southwest's Motion to Intervene and for Substitution. (R. 723-24.) On June 9, 1989, the bankruptcy court without comment entered an Order denying Bradley's Motion for New Trial. (R. 763-64.) Bradley thereafter perfected her appeal to the district court. (R. 765-792, 969.)

On November 26, 1990, the district court entered a Memorandum Opinion and Order affirming the bankruptcy court's ruling. (R. 969-85.) Bradley thereafter perfected her appeal from the Memorandum Opinion and Order entered by the district court. The Fifth Circuit Court of Appeals reversed and remanded in favor of Bradley. *Bradley v. Pacific Southwest Bank, FSB*, 960 F.2d 502 (5th Cir. 1992), *reh'g denied*, 966 F.2d 1450.

SUMMARY OF ARGUMENT

A. The *D'Oenche Duhme* Doctrine Does Not Apply.

The banking industry will not shake to its foundation, or even shudder, by the Fifth Circuit's acknowledgment of century-old Texas law that a constitutionally created right of homestead is a real defense to the attempt by a lender to enforce a void deed of trust lien. Texas homestead laws are created by the Texas Constitution. Once property has been dedicated and established as homestead, the homestead protection can only be lost by death, abandonment or alienation. The Texas homestead laws provide that a lien on homestead is valid only for purchase money financing, taxes or for home improvement loans to the extent of the value of the improvements. Equity loans and any loans for non-purchase money or non-improvement loans are void from their inception. When accepting a homestead disclaimer, a duty of inquiry is placed on lenders in the State of Texas to verify that the property is in fact being used in a non-homestead manner. If a lender fails to perform its due diligence and does not independently verify that the property is not being used for homestead, such lender will not be allowed to abrogate the Texas Constitution by relying on a homestead disclaimer.

Contrary to the Petitioner's argument, Bradley is not asserting a secret agreement made unenforceable by *D'Oenche Duhme* and its codification and progeny. Bradley is asserting a real defense to enforcement of a void lien provided by the Texas homestead laws. The Texas homestead defense to the enforceability of a lien is a real defense, just as fraud in the factum is a real defense. Thus, the *D'Oenche Duhme* doctrine is inapplicable, as it does not defeat real defenses.

The cases cited by the Petitioner for the proposition that the *D'Oenche Duhme* doctrine defeats the Texas homestead defense are inapposite, as they all involve one of the three exceptions to the

homestead defense, or they involve personal defenses as opposed to real defenses.

B. Reasons For Not Granting the Petition For Writ.

1. The Petition Does Not Raise Any Issue Of Exceptional Federal Importance.

The petition does not raise any issue of exceptional federal importance. The Petitioner argues that the FDIC will not be able to rely on records of depository institutions if the FDIC cannot rely on homestead disclaimers. However, examiners must be aware of local state laws regarding the perfection and validity of liens. An impermissible lien on homestead property is just as void as a deed of trust which is forged. Certainly, Petitioner would not argue that a state law which invalidates a forged deed is in violation of *D'Oenche Duhme*. The Texas homestead laws are similar local law requirements.

Texas has created a duty of inquiry on the part of lenders to ensure that homestead disclaimers conform with reality. Where the depository institution fails to ensure that the disclaimer meets with reality, the disclaimer is meaningless.

Contrary to the argument of Petitioner, the Fifth Circuit's decision below was not based upon constructive knowledge being imputed to the FDIC. Under Texas law, a purported lien on homestead which does not conform to law is void from its inception. Thus, knowledge or constructive knowledge is irrelevant. Actual usage as homestead is the paramount concern.

2. The Fifth Circuit's Decision Does Not Create A Conflict With The Decisions Of The Supreme Court, Other Circuit Courts, And Within The Fifth Circuit Itself.

There is no conflict between the decision rendered by the Fifth

Circuit Court of Appeals below and the decisions of this Court, other circuit courts, and within the Fifth Circuit itself. All of the cases cited by Petitioner are either cases wherein (i) the facts fit within the three well-known exceptions to the Texas homestead doctrine, or (ii) personal defenses (as opposed to real defenses) are being defeated by *D'Oenche Duhme.*

3. The Basis Of The Fifth Circuit's Decision Was Not The Constructive Knowledge Of The Failed Institution But The Homestead Rights Created By The Texas Constitution And The Longstanding Texas Public Policy Of Not Allowing Form Adhesion Contracts To Abrogate The Texas Constitution.

The imputation of constructive knowledge was not the basis of the Fifth Circuit's decision rendered below. The basis of the Fifth Circuit's decision below was that the Texas homestead doctrine creates a real defense and gives lenders a duty of inquiry to determine that homestead disclaimers conform with reality.

ARGUMENT

I.

THE *D'OENCHE DUHME* DOCTRINE DOES NOT APPLY.

The Texas homestead protection is created by the Texas Constitution and property is either homestead or not in the first instance. Once the property has been dedicated and established as a homestead, the only way for it to lose its homestead character is by death, abandonment or alienation. *Gerrard v. Henderson*, 209 S.W. 2d 225, 229 (Tex. Civ. App. 1949, no writ). To meet the initial burden of homestead character, mere evidence of overt acts of homestead usage is sufficient evidence from which Texas courts will presume that the homestead claimant possesses the requisite

intent. *See Youngblood v. Youngblood,* 124 Tex. 184, 76 S.W. 2d 759, 761 (1934). *See also First Interstate Bank v. Bland,* 810 S.W. 2d 277, 286 (Tex. App. - Fort Worth 1991, no writ); *Lifemark Corp.,* 655 S.W. 2d at 315. Once a homestead claimant has established the homestead character of his or her property, the burden shifts to the creditor to disprove the continued existence of the homestead. *See Sullivan v. Barnett,* 471 S.W. 2d 39, 43 (Tex. 1971); *Lifemark Corp. v. Merritt,* 655 S.W. 2d 310, 314 (Tex. App. - Houston [14th Dist.] 1983, writ ref'd n.r.e.). Petitioner has not questioned the nature of Paigebrooke Farm as homestead.

Under the Texas Constitution, a burden is placed on the lender to investigate at the inception of the loan as to whether or not a borrower is using property as his or her homestead. *In re Niland,* 825 F.2d at 809. To permit a lender to simply rely on a sworn declaration would

> result in the routine execution of such affidavits by persons owning homesteads in order to obtain loans secured by homestead property for impermissible purposes, thereby rendering the constitutional homestead protection nugatory. . . This rule is also based on a recognition that many in financial difficulties will sign anything to obtain money from lenders, and that *if not put to a duty of inquiry, many lenders will simply have the borrower execute a form affidavit* stating that the property is not claimed as homestead. It is interesting to note that this is exactly what happened in this case.

Id. (emphasis added).

The Texas Supreme Court has outlined three categories in

which a homestead complaint can be estopped from claiming his or her homestead:

> Our courts have in certain cases enforced against the homestead certain liens which were created neither for purchase money nor for improvements contracted for as provided for in the provision of the Constitution just quoted. Those cases were generally classified as follows: "(1) When the owners, *not actually occupying the property,* or so using it that its status is dubious at the time the mortgage is executed, represent that it is not their homestead; (2) when the owners create a lien by entering into a simulated transaction which has all the outward appearance of a valid, unconditional sale, but which is in fact a mortgage; (3) when the owners represent that existing notes are valid mechanic's lien notes for improvements, secured by a mechanic's lien contract properly executed."

Niland, 825 F.2d at 809, *quoting Lincoln v. Bennett,* 138 Tex. 56, 59, 156 S.W. 2d 504, 505 (1941) (emphasis supplied by *Niland* court).

The only cases in which courts have allowed a Texas homestead claimant to be estopped using the *D'Oenche Duhme* doctrine or 12 U.S.C. § 1823(e) are cases fitting into one of the three categories mentioned above. One of the primary cases cited by Petitioner falls into such an exception. In *Templin v. Weisgram,* 867 F.2d 240 (5th Cir. 1989), the borrower engaged in a simulated sales scheme to enable a lien to be placed on his alleged homestead through a sham transaction.. The court noted as follows:

> In *In re Howard*, 65 B.R. 498 (Bankr. W.D. Tex. 1986), the court held that the debtor's assertion that Tex. Const.. art. 16 § 50 invalidated the F.D.I.C.'s lien on his homestead was not barred by § 1823(e). Without expressing approval of the result reached or the reasoning used by that court, we note that *Howard* is distinguishable for the simple reason that, in that case, "no agreement [was] sought to be enforced by the *Howards* against the FDIC. *Id.* at 503. In *Howard*, no simulated sale took place; the debtor simply asserted that the deeds of trust which he personally executed and the bank accepted were invalid on their face. Unlike the parties in this case, therefore, neither party in *Howard* sought to enforce or introduce evidence relating to an undisclosed side agreement in contravention of § 1823(e).

Templin, 867 F.2d at 242, n. 3.

The *Templin* court distinguished the simulated sale situation from the homestead defense which was discussed in *Howard*. The borrowers in *Howard* executed a document whereby they represented and warranted that the lien on the property was valid. 65 B.R. at 500. As in the instant case, the court in *Howard* held that there was no secret oral agreement which the borrower was attempting to enforce. 65 B.R. at 503. The court held that the borrowers were not relying on any agreement but were rather asserting a claim based upon a well established body of homestead law in the State of Texas which provides that the lien sought to be enforced is void to the extent that it provides for a lien on homestead to secure obligations which are not for purchase money financing, taxes nor improvements. *Id.* The court held that Texas law would not recognize even an express, voluntary waiver or

disclaimer of the constitutional right to claim a homestead. *Id.* at 503, *citing White v. Luton* (*In re White*), 47 B.R. 98, 101 (Bankr. S.D. Tex. 1985); *Texas Land and Loan Company v. Blalock*, 76 Tex. 85, 13 S.W. 12, 13 (1890). The *Howard* court held that Texas homestead laws "exist independent of any agreement between the parties and, indeed, in spite of any agreement." *Id.*

The *Howard* court held that Texas homestead laws rendered the original transaction in which the lender sought to impose alien void and not just voidable. *Id.* at 507-508. Thus, the borrowers' homestead defense was a real defense to the enforcement of the lien as distinct from the personal defenses which are barred by 12 U.S.C. § 1823(e), the *D'Oenche Duhme* doctrine, and the federal holder in due course doctrine. *Id.* at 508. The absolute invalidity under Texas law of the non-purchase money lien on the borrowers' homestead distinguishes the homestead case from those involving the assertion of merely personal defenses and, in the absence of congressional intent to exempt the FDIC from homestead laws, the *Howard* court held that the FDIC is subject to the laws of Texas governing the validity of liens on a homestead. Therefore, the FDIC's lien on the borrowers' homestead was declared void to the extent it did not secure purchase money financing, an improvement loan, or a tax claim. *Id.* at 509.

The Fifth Circuit Court of Appeals in *Patterson v. Federal Deposit Insurance Corporation*, 918 F.2d 540 (5th Cir. 1990) held that neither 12 U.S.C. § 1823(e) nor the federal holder in due course doctrine precluded a borrower from attempting to prove her right under Texas law to her homestead. *Id.* at 543-544. In *Patterson*, the court distinguished the facts in *Templin* which fell within one of the few recognized means in Texas for precluding a homestead defense (*i.e.*, the simulated sale scenario). *Id.* at 545. The court held that the homestead disclaimer contained in the deeds of trust did not result in the debtor being estopped from claiming homestead. *Id.* at 546-47.

In a case directly on point with the facts in *Bradley*, the court in *In re Napier*, 144 B.R. 719 (Bankr. W.D. Tex. 1992) held that the *D'Oenche Duhme* doctrine and its codification did not estop the debtors from asserting their Texas homestead exemption even though the debtors had executed non-homestead affidavits and designations. *Id.* at 725.

In the instant case, Bradley established the homestead character of the entire 129.47 acres as a matter of law and met her initial burden of proof by showing evidence of overt acts of homestead usage and other evidence of intention. Petitioner has never asserted that the homestead nature of the property was abandoned or alienated by Bradley. Petitioner relies solely upon the homestead disclaimer and affidavit which courts in Texas have uniformly held to be invalid for over one hundred years. *See In re Niland*, 825 F.2d 801, 808-810 (5th Cir. 1987).

The only cases cited by Petitioner where the *D'Oenche Duhme* doctrine or 12 U.S.C. § 1823(e) was used to defeat a homestead claim are *Templin* (a simulated sale case) and *Buchanan v. Federal Savings & Loan Insurance Corporation*, 935 F.2d 83 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 639 (1991) (a mechanic's lien note case). Both of these cases fit within the well recognized exceptions to the homestead doctrine and are therefore not homestead cases such as exist in the *Howard, Niland, Napier, Patterson*, and the instant case.

In *Buchanan*, the debtor signed a contract creating a lien on her house which contract contained a recital that the work had not yet begun nor had materials yet been supplied prior to the signing of the document. *Buchanan*, 935 F.2d at 8. The providing of materials or commencement of work prior to the signing of such document would render the document invalid under Texas law. *Id.* However, the *Buchanan* facts fit squarely within one of the well recognized state law exceptions to the homestead doctrine. *Niland*,

825 F.2d at 809. Unlike the factual misrepresentation by the borrower in *Buchanan*, in the instant case, Kelly Bradley signed the homestead disclaimer based upon an erroneous legal conclusion conveyed to her that the property she owned was within the city limits of Westlake and that she was, therefore, entitled to only one acre by law. However, location within the city limits is not dispositive of the urban versus rural homestead character of a property if no city services are provided. Tex. Prop. Code § 41.002(c). No city services such as the providing of water and sewer services were provided by the City of Westlake (R. 268-269) and, therefore, the issue of the location within the city limits of Westlake was not dispositive.

In this case, Bradley does not seek to enforce any agreement with Seguin. The Texas homestead laws exist independent of any agreement between the parties and, indeed, in spite of any agreement. *Howard*, 65 B.R. at 503. Bradley established the rural homestead character of the entire 129.47 acres as a matter of law and, therefore, the burden shifted to the Petitioner to show abandonment. The Petitioner did not even attempt to argue abandonment and simply argued estoppel based upon a homestead affidavit and disclaimer. However, the homestead affidavit and disclaimer did not fall within one of the three well recognized exceptions to the Texas homestead laws and, therefore, homestead is a "real" defense not precluded by *D'Oenche Duhme*, 12 U.S.C. § 1823(e), or the federal holder in due course doctrine. Thus, under Texas law, the lien of Seguin was void from its inception. No title to a void lien could be passed to the FSLIC and Pacific does not have a valid lien on the property. *See Langley v. Federal Deposit Insurance Corporation*, 484 U.S. 86, 93-94 (1987); *Howard*, 65 B.R. at 507-508.

II.

REASONS FOR NOT GRANTING THE PETITION FOR WRIT.

A. The Petition Does Not Raise Any Issue Of Exceptional Federal Importance.

As outlined above, neither the *D'Oenche Duhme* doctrine, 12 U.S.C. § 1823(e), nor the federal holder in due course doctrine precludes the homestead defense created by the Texas Constitution. The Petitioner argues that this is a case of national importance affecting the integrity and stability of the national banking system. The Petitioner cites to the decision in *Langley v. Federal Deposit Insurance Corporation,* 484 U.S. 86 (1987) for the premise that the *D'Oenche Duhme* doctrine permits federal and state banking examiners to rely upon a depository institution's records in evaluating its worth and in determining whether to liquidate or to provide financing for any acquisition and purchase. *See* Pacific's Petition for Writ of Certiorari (the "Petition"), Page 12. In fact, the decision in *Langley* supports the Respondent's position.

This Court in *Langley* stated that "Respondent conceded at oral argument that the real defense of fraud in the factum . . . would take the instrument out of Section 1823(e), because it would render the instrument entirely void, . . . thus leaving no 'right, title or interest' that could be 'diminish[ed] or defeat[ed]'." *Id.* at 93-94. This Court recognized that there are certain defenses to the *D'Oenche Duhme* doctrine and § 1823(e), carefully distinguishing between voidable title and void title. Because the defense alleged in *Langley* involved alleged agreements and misrepresentations on the part of the bank (*i.e.,* personal defenses), these defenses merely rendered the promissory note voidable rather than void. *Id.* at 94. As demonstrated above, the homestead defense of Bradley resulted in a void lien. Since the lien was void, there was no title or interest

to be transferred to the FSLIC nor, in turn, to Pacific.

The Fifth Circuit's decision in *Bradley* is not based upon the constructive knowledge of Seguin being charged to Pacific as argued by Petitioner. Constructive knowledge is irrelevant. Instead, the decision was based on the fact that the lien was void from its inception. As in *Howard,* Bradley does not seek to enforce any agreement, but simply seeks to enforce the substantive laws of the State of Texas rendering the subject lien void.

"*D'Oenche Duhme* has not been read to mean that there could be no defenses at all to the attempts by the FDIC to collect on promissory notes." *Federal Deposit Insurance Corporation v. McClanahan,* 795 F.2d 512, 515 (5th Cir. 1986). Forgery would be such a real defense which would not be precluded by the *D'Oenche Duhme* doctrine. *Id.* The Sixth Court of Appeals has also recognized that while personal defenses to a note would not be effective against the FDIC, "a holder in due course remains susceptible to all 'real' defenses. Real defenses include infancy, incapacity, duress, some material alterations, and real fraud." *Federal Deposit Insurance Corporation v. Turner,* 869 F.2d 270, 273 (6th Cir. 1989).

Using the Petitioner's logic, any defense at all to the enforcement of a note or a lien which does not appear in a bank's records would be defeated including, without limitation, the real defenses of infancy, incapacity, duress, and fraud in the factum. Thus, if the Supreme Court holds that the *D'Oenche Duhme* doctrine precludes the assertion by Texas borrowers of the homestead defense, all real defenses to the enforcement of notes and liens may thereafter be precluded by the *D'Oenche Duhme* doctrine. By leaving the decision of the Fifth Circuit intact, the court will continue the law as announced in *Langley* and upheld by the Fifth Circuit and the other circuits that real defenses as opposed to personal defenses are effective against all lenders including,

without limitation, the FDIC, the FSLIC, the RTC and their assignees.

B. The Fifth Circuit's Decision Does Not Create A Conflict With The Decisions Of The Supreme Court, Other Circuit Courts, And Within The Fifth Circuit Itself.

The Petitioner asserts that there is a conflict between the Fifth Circuit decision in *Bradley* and the decisions of the Supreme Court, other circuits, and within the Fifth Circuit itself. Petition, Pages 14-22. An analysis of the decisions cited to by Petitioner reveals that all of the decisions cited therein involve personal defenses and none involve real defenses.

Petitioner cites to the decision in *Langley* and refers to agreements and conditions precedent to the performance of a "counter promise" or "the truthfulness of a warranted fact." Petition, Page 16. The decision in *Langley* is discussed above and is distinguishable for the reasons discussed. The decision in *Langley* involved alleged fraud in the inducement and alleged misrepresentations on the part of the borrower. Both of these allegations involved personal defenses, not real ones.

In *Abrams v. FDIC,* 944 F.2d 307, 310 (6th Cir. 1991), an alleged oral promise by the bank's president not to collect any deficiency remaining after a default by the borrower was held by the court to be barred. Obviously, this was a personal defense which was precluded by the *D'Oenche Duhme* doctrine and § 1823(e).

In *Porras v. Petroplex Savings Association,* 903 F.2d 379, 380-81 (5th Cir. 1990), cited by Petitioner, the personal defense of usury was asserted. It is, therefore, distinguishable from the instant case.

The decision in *Templin* is discussed above and involved a

simulated sale/sham transaction which fits within one of the three exclusive exceptions to the homestead exemption laws of the State of Texas. In addition, the court in *Templin* carefully distinguished a constitutional homestead case from the simulated sale scenario existing in *Templin*. 867 F.2d at 242, n. 3.

The decision in *FDIC v. Galloway*, 856 F.2d 112, 114-15 (10th Cir. 1988) involved a purported false statement by a bank president to guarantors that the maker of the note had paid the note off. The defense asserted by the defendant in *Galloway* was based upon an alleged representation by the bank president that the guarantor would only be liable for the obligation on the note issued at the time that the guarantor signed his guaranty. This alleged defense was in the nature of an oral promise or fraud in the inducement, and, as such, it was a personal defense precluded by § 1823(e). *Id.* at 114-115.

In *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1372 (5th Cir. 1988), the guarantors' defense arose out of a bank officer's alleged fraudulent statement to the guarantors that the guaranties would not be enforced according to their express terms but would only cover the corporation's present indebtedness. Obviously, this defense was a personal defense in the nature of an oral promise or fraud in the inducement.

In *FDIC v. Investors Associates X., Ltd.*, 775 F.2d 152, 156 (6th Cir. 1985), the maker signed two blank notes based upon the bank's president's unrecorded, oral assurances that the maker would not be personally liable and would never have to pay on the promissory notes. *Id.* at 155. This case is distinguishable from the instant case since the facts in *Investors* fit squarely within the *D'Oenche Duhme* doctrine whereby a borrower gives a note to a bank with a secret agreement that it will not be enforced. *D'Oenche Duhme*, 315 U.S. at 460. Kelly Bradley is not seeking to enforce any agreement at all but is asserting that the lien was void from its inception. *Howard*, 65 B.R. at 503.

In all of the factual scenarios cited by the Petitioner, the defenses were personal defenses which merely involved voidable title to the asset in question. None of the cases involved real defenses such as the homestead right created under Texas state law or forgery, infancy, incapacity, duress, or fraud in the factum. Thus, contrary to Petitioner's assertion, there is no direct and apparent conflict by the Fifth Circuit decision in *Bradley* with the decisions of the Supreme Court, other circuit courts, and within the Fifth Circuit itself.

C. The Basis Of The Fifth Circuit's Decision Was Not The Constructive Knowledge Of The Failed Institution But The Homestead Rights Created By The Texas Constitution And The Longstanding Texas Public Policy Of Not Allowing Form Adhesion Contracts To Abrogate The Texas Constitution.

The Petitioner asserts that the Fifth Circuit's decision in Bradley is based upon the charging of constructive knowledge of the failed depository institution to the successor depository institution. As set forth above, this was not the basis of the Fifth Circuit's decision. Bradley is not attempting to enforce any agreement against or impute any constructive knowledge to the FSLIC or Pacific, but rather it is Pacific which is seeking to enforce its deed of trust and the disclaimer. *Howard*, 65 B.R. at 503. Bradley is not relying on any agreement but is asserting a claim based upon a well established body of law of the State of Texas which provides that the agreement which Pacific seeks to enforce is void. *Id.* Knowledge or constructive knowledge is irrelevant.

The cases of *Capital Bank & Trust Co. v. 604 Columbus Avenue Realty Trust (In re 604 Columbus Avenue Realty Trust)*, 968 F.2d 1332 (1st Cir. 1992); *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845 (3rd Cir. 1991), and *Twin Construction, Inc. v. Boca Raton, Inc.*, 925 F.2d 378 (11th Cir. 1991) cited by Petitioner involved, respectively, (i) fraud in the

inducement and an alleged kick-back arrangement between a bank officer and the debtor's representative; (ii) an alleged side agreement wherein the lender purportedly agreed to reserve funds to satisfy an agreement between the owner and the contractor; and (iii) an alleged fraud in the inducement defense. These cases are inapposite as all involved personal defenses.

Similarly, the decisions from the Fifth Circuit cited by Petitioner as being in conflict with the Fifth Circuit's *Bradley* decision are easily distinguishable. The decision by the Fifth Circuit in *FDIC v. Langley*, 792 F.2d 541 (5th Cir. 1986), *aff'd*, 484 U.S. 86 (1987) is distinguishable for reasons cited above including, without limitation, the fact that *Langley* involved an alleged fraudulent misrepresentation and fraud in the inducement on the part of the lender, not fraud in the factum. *Kilpatrick v. Riddel*, 907 F.2d 1523 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 954 (1991), involved alleged fraud in the inducement and certain alleged oral misrepresentations and omissions on the part of the bank officers which were personal defenses.

With respect to the citation by the Petitioner to *Aero Support Sys., Inc. v. FDIC*, 726 F. Supp. 651 (N.D. Tex. 1989), the Petitioner's citation is erroneous because the *dicta* in *Aero Support* is erroneous. In citing to *Templin*, the court in *Aero Support* stated that the Fifth Circuit had recently indicated that the *D'Oenche, Duhme* doctrine may override such protections as the Texas homestead exemption protection. 726 F. Supp. at 653. As discussed *supra*, *Templin* does not stand for such proposition, and, therefore, Petitioner's reliance on *Aero Support* for such proposition is equally misplaced. The *Templin* case involved a simulated sale/ sham transaction which is one of three well recognized exceptions to the homestead exemption. The *Templin* court went to great lengths to distinguish itself from the facts in *Howard* since the *Templin* court recognized that the borrowers in *Howard* were not seeking to enforce an agreement of any kind but were simply

relying on the long established homestead exception law in the State of Texas. *Templin,* 867 F.2d at 242, n. 3. Thus, *Aero Support* provides little support to the Petitioner's position.

CONCLUSION

The Texas homestead laws have a long history of protecting borrowers from not only unscrupulous lenders and charlatans but from themselves. The law in Texas allows liens on homestead only for purchase money financing, tax liens, and improvements to the property. Texas law imposes a duty of inquiry on lenders to investigate whether property is in fact not the homestead of the borrower. If the lender fails to investigate, or investigates and reaches the wrong conclusion, or, as in the present case, suspects that the property probably is homestead but asks for a form adhesion disclaimer to be signed, the lender has a *void* lien. Knowledge or constructive knowledge is irrelevant.

Bradley met her initial burden of proof to show that the property was her homestead. The burden then shifted to Seguin, now Pacific, which never even attempted to prove abandonment of that homestead but relied solely upon an estoppel argument based upon the homestead disclaimer and affidavit. There are only three exceptions to the homestead exemption involving estoppel in the State of Texas, and the facts in the instant case do not fit within any of the three exceptions.

Homestead is a real defense such as forgery, infancy, duress, incapacity, and fraud in the factum. All of the cases cited by Petitioner involved personal defenses such as fraud in the inducement or they fit within well known exceptions, and are therefore not on point.

The decision by the Fifth Circuit does not conflict with any decisions of the Supreme Court, any decisions in any other circuits,

and there is no conflict within the Fifth Circuit Court of Appeals. The decision below of the Fifth Circuit Court of Appeals provides no basis for this Court to grant a Writ of Certiorari.

WHEREFORE, the Respondent respectfully prays that this Court deny the Petition for Writ of Certiorari, and grant to the Petitioner such other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

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SUPREME COURT, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-840

In The

Supreme Court of the United States

October Term, 1992

COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Petitioner,

v.

KELLY P. BRADLEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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LIST OF PARTIES

Petitioner: Commonwealth Land Title Insurance Company[1]

Respondent: Kelly P. Bradley

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[1] Pursuant to Supreme Court Rules 15.7 and 29.1, Petitioner Commonwealth Land Title Insurance Company certifies that its parent corporation is State Title Insurance Company, and that all of its subsidiary corporations (except wholly owned subsidiaries) are Lauderdale Title Insurance Corporation and Title Insurance Company.

TABLE OF AUTHORITIES

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

Respondent Kelly P. Bradley's ("Bradley" or "Respondent") Brief in Opposition does not dispute the major and underlying factual premise of the Petition for Writ of Certiorari of original Petitioner Pacific Southwest Bank ("Pacific")[2], *which is that all the written records*

[2] Respondent correctly notes that on January 27, 1993, after Pacific filed the Petition for Writ of Certiorari, Commonwealth Land Title Insurance Company ("Commonwealth" or "Petitioner") acquired by assignment the note and lien in question from Petitioner

(including the sworn statement that both Respondent and her husband signed and delivered to Petitioner's predecessor, Seguin Savings Association ("Seguin")), reflected that 114.47 acres of Paigebrook Farm was not a part of the Bradleys' homestead. Similarly, Respondent does not deny that the sworn statements she and her husband made under oath regarding their homestead are false.

Rather, Respondent attempts to justify her actions "based upon [her] husband's mistaken belief that under Texas law, because Paigebrook Farm was located within the incorporated town of Westlake, it would necessarily be categorized as urban land and, therefore, the Bradleys would only be entitled to one acre of Paigebrook Farm as their homestead." (Brief at 3.) This explanation is meaningless, however, because Respondent's affidavit is a sworn statement of *fact*, and is not meant to require Respondent or her husband to render a legal opinion. Therefore, the legal acumen of Respondent or her

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Pacific. Commonwealth therefore substitutes itself as Petitioner and real party in interest under Supreme Court Rule 15.7.

However, Commonwealth's acquisition by assignment of the note and lien in question has no bearing upon the issues before the Court because Commonwealth is contractually subrogated to all of Pacific's rights. Moreover, the "shelter doctrine" provides Commonwealth with equal standing to assert all of the arguments initially advanced by Pacific. *See, e.g., Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990), *cert denied, Rogers v. FDIC*, ___ U.S. ___, 111 S. Ct. 954 (1991) (holding that the *D'Oench, Duhme* doctrine extends to assignees of the FDIC); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 381 (5th Cir. 1990) (holding that the *D'Oench, Duhme* doctrine extends to assignees of the FDIC); *FDIC v. Newhart*, 892 F.2d 47, 50 (8th Cir. 1989) (holding that the protection afforded the FDIC under § 1823(e) transfers to subsequent purchasers).

husband is irrelevant. Moreover, Respondent's explanation is particularly disingenuous in this case because her husband is a prominent Dallas real estate attorney who is well-versed in the areas of Texas homestead law and all of its implications.

Respondent then argues that the Court should not grant the Petition because (1) Petitioner allegedly does not challenge the validity of her homestead claim, and (2) the doctrine announced in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (hereinafter "*D'Oench*"), and its statutory counterpart 12 U.S.C. § 1823(e), does not apply to her homestead claim because Petitioner's lien on Paigebrook Farm is allegedly void (rather then voidable) under Texas homestead law. Respondent is incorrect on both counts.

First, Petitioner has always and continues to challenge Respondent's homestead claim. (See Petition at 4-9.) Respondent has apparently misread the requirements imposed upon Petitioner of providing this Court with reasons why it should grant its Petition.

Second, Petitioner's lien on Paigebrook Farm is not properly analogous to a promissory note that is void rather than voidable, however superficially appealing such a distinction may be. The so-called "real" defenses alluded to by Respondent involve situations in which an innocent borrower is excused from performance under an obligation. Forgery is a perfect example. Obviously a borrower should not be required to repay a note the borrower never signed. Here, by contrast, Respondent and her husband do not share the "innocence" of a borrower whose signature has been forged. Rather, Respondent and her husband made an actual affirmative

misrepresentation to Seguin under oath and in writing, which they then delivered to Seguin to be placed in its permanent records. In so doing, Respondent and her husband lent themselves to a scheme that would – and in this case did – mislead the banking authorities, in the classic sense of the *D'Oench* doctrine. *D'Oench*, 315 U.S. at 460.

Under these types of circumstances other courts have held that a party may not circumvent the estoppel powers of *D'Oench* by arguing that the transaction is void under applicable law. For example, in *Castleglen, Inc. v. Resolution Trust Corp.*, No. 90-4002, 1993 WL 27915 (10th Cir. Feb. 9, 1993), the court rejected the very distinction Respondent attempts to draw here between "void" and "voidable" obligations in the context of a failed lending institution. In *Castleglen*, the plaintiffs brought an action for damages or, alternatively, for recision regarding a real estate transaction. In support of their claims, the plaintiffs argued, among other things, that the agreements under which they invested in the real estate project were illegal and, hence, void. Accordingly, plaintiffs argued, as does Respondent here, that the *D'Oench* doctrine simply did not apply. The Tenth Circuit disagreed finding guidance in the well settled reasoning from the Restatement of Contracts:

> Castleglen argues that the agreements by which it invested in the Santa Fe project were illegal and VOID abinitio; thus they were beyond the protection of *D'Oench* since a legal nullity cannot logically be an "asset" which a side agreement would impair. Castleglen charges that the

agreements violated federal regulations concerning tie-in provisions, brokerage commissions and appraisal requirements under 12 C.F.R. 563.35, 563.40, and 563.9(b), as well as a number of Texas banking regulations. Tex. Admin. Code 64.1 and 64.5. The district court rejected this argument, finding an arbitrary refusal to grant relief under a contract merely in violation of the statutes would create incongruous results. 728 F. Supp. at 671.

The Utah courts recognize the general rule that "every contract in violation of law is void." *Baker v. Latses*, 206 P. 553, 555 (1922). However, this rule is not to be blindly applied. *Ross v. Producers Mutual Insurance Co.*, 295 P.2d 339, 342 (Utah 1956). Rather the practice of the Utah courts has consistently been to look to the purpose of the statute involved to determine whether it requires that contracts which violate the statute be void, or that a particular type of relief be granted. (Footnote omitted).

The purpose of the prohibitions and regulations at issue here is to ensure the solvency of savings and loan institutions by requiring that they follow specific procedures. This case thus presents the issue explored in an illustration in the Restatement of Contracts. There the example is given of a bank which enters into a type of contract which is forbidden by statute. In the Restatement's view an "[a]ction can be maintained on the [contract], since otherwise the creditors and shareholders of the bank, for whose protection the statute is enacted, would be injured." Restatement of Contracts 601, Illustration 1. *See also, McCormick v. Life Insurance Company of America*, 308 P.2d 949, 952 (Utah

> 1957) (arbitrary refusal to grant relief under contracts merely because of violation of statute often brings incongruous results); Restatement (Second) of Contracts 179, comment C(6). The statutory purpose of protecting the insurance fund and depositors would not be furthered in this case by declaring the contract void since this would only deplete the resources of the institution. Rather the appropriate remedy should be the statutorily prescribed one which focuses on ending continuing violations and disciplining the bank officers who approve such transactions. (Footnote omitted).

Id. at *11.[3] *See also Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816, Int'l Bhd. of Elec. Workers*, 646 F.2d 264, 267 (6th Cir. 1981) ("it is not the case that all unlawful agreements are ipso facto void. If the denial of relief is disproportionately inequitable the right to recover will not be denied."); *Graham v. Dean*, 188 S.W.2d 372, 373 (Tex. 1945) ("The rule that a court will not entertain a suit growing out of an illegal contract is not always applicable where the parties are not in pari delicto.").

Applying the principle announced in *Castleglen* to the facts in this case compels an identical result. A borrower may not wholesale circumvent the holding in *D'Oench* by merely labelling the obligation in question as void under another law. *Kilpatrick v. Riddle*, 907 F.2d at 1529 ("It is not the nature or enforceability of an agreement between a

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[3] Moreover, under the current state of the law, if not reversed, the Fifth Circuit's decision in this case will conflict with the Tenth Circuit's decision in *Castleglen*.

bank and borrower that controls the application of the *D'Oench, Duhme* doctrine . . . "). Rather, a borrower may *only* escape the application of *D'Oench* under a defense that is consistent with the policy underlying that doctrine – in other words, where the borrower is innocent and did not lend herself to a scheme that was likely to mislead the banking authorities. Here, as a result of Respondent's own affirmative misrepresentations, she does not fall within the class of innocent borrowers who are exempt from the holding in *D'Oench*. Therefore she may not escape its application by arguing that Petitioner's lien is void under Texas homestead law.

Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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